Judgments
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The jurisdiction of the Administrative Tribunal has been recognised by the following organisations (in order of recognition):

International Labour Organization (ILO), including the International Training Centre
World Health Organization (WHO), including the Pan American Health Organization (PAHO)
International Telecommunication Union (ITU)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Meteorological Organization (WMO)
Food and Agriculture Organization of the United Nations (FAO)
European Organization for Nuclear Research (CERN)
World Trade Organization (WTO)
International Atomic Energy Agency (IAEA)
World Intellectual Property Organization (WIPO)
European Organization for the Safety of Air Navigation (Eurocontrol)
Universal Postal Union (UPU)
European Southern Observatory (ESO)
Intergovernmental Council of Copper Exporting Countries (CIPEC)
European Free Trade Association (EFTA)
Inter-Parliamentary Union (IPU)
European Molecular Biology Laboratory (EMBL)
World Tourism Organization (WTO)
European Patent Organisation (EPO)
African Training and Research Centre in Administration for Development (CAFRAD)
Intergovernmental Organisation for International Carriage by Rail (OTIF)
International Center for the Registration of Serials (CIEPS)
International Office of Epizootics (OIE)
United Nations Industrial Development Organization (UNIDO)
International Criminal Police Organization (Interpol)
International Fund for Agricultural Development (IFAD)
International Union for the Protection of New Varieties of Plants (UPOV)
Customs Co-operation Council (CCC)
Court of Justice of the European Free Trade Association (EFTA Court)
Surveillance Authority of the European Free Trade Association (ESA)
International Service for National Agricultural Research (ISNAR)

International Organization for Migration (IOM)
International Centre for Genetic Engineering and Biotechnology (ICGEB)
Organisation for the Prohibition of Chemical Weapons (OPCW)
International Hydrographic Organization (IHO)
Energy Charter Conference (ECC)
International Federation of Red Cross and Red Crescent Societies
Preparatory Commission for the Comprehensive Nuclear-Test-Ban
Treaty Organization (CTBTO PrepCom)

EIGHTY-NINTH SESSION

***In re* Palma (No. 8)** **Judgment No. 1948**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 2 July 1998, the ESO's reply of 21 October, the complainant's rejoinder of 21 November 1998 and the Observatory's surrejoinder of 12 January 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian national, served on the staff of the Observatory from 1 September 1989 to 31 August 1995. Further information about his career and facts relevant to this case are set out in Judgment 1665 of 10 July 1997 on his first complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO.

While in service with the Observatory the complainant contracted an injury to his left eye, resulting in substantial loss of sight. The ESO Rehabilitation Board set the degree of disability and the loss of earning capacity at 39 per cent.

In a letter of 3 March 1998 to the Director General of the ESO the complainant requested an "ESO Certification of Disability" stating that such a certificate was necessary for obtaining certain disability benefits and privileges from the Italian and German governments. Having received no reply he sent a second letter on 14 April appealing against the implied rejection of his request and inviting the Director General to consult the Joint Advisory Appeals Board. He is impugning the implied rejection of this appeal.

B. The complainant contends that both the Italian and the German applications for national disability assistance require a certificate of disability from the ESO. He argues that under Article R II 1.25 of the Staff Regulations "any member of the personnel shall be deemed to be a handicapped person when he is ... recognized as such by the Director General" and therefore the Director General is competent to provide him with the requested certificate. In addition, he argues that Article V 1.01 of the Staff Rules, which states "social security schemes shall safeguard ... the members of the personnel and their family against the economic consequences of illness, accident and disability", creates a moral duty for the ESO to help staff members to obtain national disability assistance. By not complying with his request the ESO has breached this moral duty and has violated its own rules and regulations as well as human rights principles as recognised by the International Labour Organization (ILO) and the United Nations.

The complainant asks the Tribunal to quash the implied decision and order the ESO to provide him with the requested certificate of disability. He also claims costs.

C. In its reply the ESO states that it does not object to receivability; nevertheless, the Tribunal might deem the complaint vexatious. In any case, it argues, the complaint is not founded in law. In addition, the complainant makes several allegations that are untrue or unrelated to the present complaint and the Observatory's silence on these allegations should not be construed as tacit agreement.

The complainant has incorrectly interpreted what is required in the application forms for national disability benefits. His disability should be certified by the appropriate public administration office of the country concerned. It is an error to assert that a certificate from the ESO would satisfy this requirement. There is no reason for the ESO to provide the complainant with such a certificate. However, it would make available to the complainant copies of relevant documents upon request. The complaint is neither founded on the ESO's Staff Rules and Regulations nor on the general principles of international civil service law.

D. In his rejoinder the complainant argues that any finding of vexatious behaviour should be against the ESO for not responding to his appeals and forcing him to apply to the Tribunal for relief. He presses his arguments that the ESO must provide him with a certificate of disability.

E. In its surrejoinder the Observatory notes that the complainant's rejoinder does not dispute the Observatory's interpretation that the national laws of Germany and Italy do not require the ESO to furnish a certificate of disability. It presses its argument that this is the responsibility of the national offices for social welfare and that the ESO Convention does not grant the Observatory authority to issue such a certificate.

The complainant already possesses documentation, such as medical certificates and the findings of the ESO Rehabilitation Board, which he may use to support his claim to the national authorities. If requested by those authorities the Observatory would cooperate in providing further information but such cooperation has not yet been requested. The complainant errs in relying on Article R II 1.25 of the Staff Regulations which applies to "member[s] of the personnel" and only "within the meaning of the [ESO] Staff Regulations". It does not pertain to an application for national disability benefits from a "former staff member".

CONSIDERATIONS

1. On 3 March 1998 the complainant addressed a letter to the Director General of his former employer, the ESO, the relevant part of which reads as follows:

> "I kindly ask ESO to provide me in 3 copies on Head Paper a CERTIFICATION OF DISABILITY, each set of three in ENGLISH, ITALIAN and GERMAN (in accordance to the attached sample ANNEX 1), where the main points, to be mandatory evidenced under pain of depriving me of national rights, are:
>
> 1. The nature and Structure of the ESO, in particular its relation with the Government of Italy and Germany;
> 2. My personal data and my contractual relation with the ESO;
> 3. The ESO process of definition of my disability;
> 4. Ascertainment and declaration of disability with concerned handicap;
> 5. Open Declaration corresponding to the truth, that ESO terminated my contract after that my disability was medically stated on 11.5.1994 and while it was still in phase of consolidation by 2.2.1995 (Date of handed letter of Notice);
> 6. Open declaration corresponding to the Truth, that ESO is denying me any possibility to be re-employed as handicapped in the Organization since 2.2.1995;
> 7. Open declaration corresponding to the Truth, that ESO threw me off of its premises in five minutes on 28.6.1995 without first assuring me Rehabilitation Measures, i.e. a Health Insurance, of which I still remain uncovered;
> 8. Final certification that ESO does not want to re-employ me anymore, even as handicapped, and ESO charges the national Administrations of ITALY and GERMANY of the duty to guarantee me "INTEGRATION OF HEALTH INSURANCE" and ALL PRIVILEGES AND ASSISTANCE FORESEEN BY THE NATIONAL LAWS IN FAVOUR OF HANDICAPPED PEOPLE, INCLUSIVE THE RIGHT TO CONCERNED SOCIAL NATIONAL HELPS AND OCCUPATION (provided that I still may work following a second disability under dispute)."

2. Not having received a reply, the complainant wrote again on 14 April 1998 to ask that the ESO answer his earlier letter.

3. By his complaint filed on 2 July 1998 he attacks the Director General's implied negative decision. He asks that the decision be quashed and claims costs.

4. The complainant clearly has no right to a certificate in the terms demanded. Many of such terms would negate specific findings made by the Tribunal in earlier judgments involving the complainant as noted below.

5. More particularly in Judgments 1665 and 1718, the Tribunal has already made a number of specific findings of facts with respect to the complainant's employment history and his subsequent dealings with his former employer. These may be summarised as follows:

(a) the complainant did not appeal against the ESO's decision not to renew his contract when it expired on 31 August 1995; it is accordingly no longer open to the complainant to argue that he was dismissed because of his disability (Judgment 1665 under 10);

(b) the complainant is not entitled to payment of an incapacity pension having been neither dismissed nor reclassified because of incapacity (Judgment 1665 under 11);

(c) the complainant was originally granted an unsuitability pension but later obtained *ex gratia* benefits equivalent to a 40 per cent partial incapacity pension; this, however, was not an incapacity pension (Judgment 1665 under 13 and 17);

(d) the complainant was informed in August 1996 that although he was not entitled to continued health insurance coverage through the ESO, the insurance brokers, Van Breda, were prepared to grant him coverage from September 1995 upon his paying 60 per cent of the normal premium; that offer was turned down by the complainant (Judgment 1718 under 4 and 5).

6. Apart from his assertions, for which he offers not a shred of evidence of fraud and bad faith on the part of the ESO, the complainant advances no argument which would justify the Tribunal in departing from its previous judgments or in ignoring the rule of *res judicata*.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-NINTH SESSION

***In re* Palma (No. 9)** **Judgment No. 1949**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 2 July 1998, the ESO's reply of 12 October, the complainant's rejoinder of 26 October, and the Observatory's surrejoinder of 3 December 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian national, served on the staff of the ESO from 1 September 1989 to 31 August 1995. Further information about his career and facts relevant to this case are set out in Judgment 1665 of 10 July 1997 on his first complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO. Under an agreement concluded in 1968 between the ESO and CERN, and as revised in 1983 and 1991, the staff of the ESO are participants in the Pension Fund of CERN.

While working at the ESO the complainant contracted an injury to his left eye, resulting in substantial loss of vision. An expert ophthalmologist determined the injury to be "unforeseeable and unpreventable" and the ESO Rehabilitation Board set the degree of disability and the loss of earning capacity at 39 per cent. The complainant was informed in a letter of 17 October 1995 that the Director General accepted the recommendations of the Rehabilitation Board to award the complainant an "unsuitability pension" under the CERN Pension Fund. On 2 December 1995 the complainant appealed against this decision to the Director General, complaining in particular that the decision omitted any provision for health benefits.

The Head of the Personnel Department informed the complainant in a letter of 3 June 1996 that following the decision of the CERN Pension Fund to grant him "ex gratia benefits equal to a partial incapacity of 40%, retroactive from 1 September 1995" instead of an "unsuitability pension", there would not be a "continuation of guarantees" under the health insurance policy administered by the brokers Van Breda. Individual continuation of coverage would have been possible only if he had requested it prior to leaving the ESO. On 22 August 1996 he also informed the complainant that Van Breda could provide him, exceptionally, with "a retroactive continuation of insurance coverage"; due to his 40 per cent *ex gratia* pension he would pay only 60 per cent of the premium. The complainant was invited to respond to this proposal and he informed the Head of the Personnel Department in a letter of 31 August that he was unable to agree to it. He also requested the ESO to confirm that its decision not to grant him full health insurance coverage as a rehabilitation measure was final so that he could appeal to the Administrative Tribunal of the International Labour Organization (ILO).

After receiving Judgment 1718 on his first complaint against the ESO, the complainant wrote to the Head of Administration on 9 February 1998 communicating his "availability to accept the ESO offer of health insurance". On 27 February 1998, Personnel Services forwarded to him Van Breda's new offer of health insurance coverage retroactive from 1 September 1995. This offer required him to pay the premium in a lump sum of 27,208.62 German marks. In a letter of 4 March 1998 the complainant said that he was unable to pay such a sum and asked the ESO to pay for fully insuring him from 1 September 1995; however, he said he would be able "to settle the matter with ESO" for his share at a later stage. Personnel Services replied on 26 March 1998 that the offer was valid only under the conditions laid out in the letter of 27 February. On 28 March the complainant wrote to Personnel Services that "health insurance for my 40% disability is a first duty of ESO" and requested the ESO to "agree to cover [him] immediately with full health insurance (or at least with [the ESO's] due 40%)". Having received no answer to this letter he appealed to the Director General on 14 April 1998. He is impugning the implied rejection of his appeal.

B. The complainant argues that the ESO has a duty to provide health benefits for recognised "invalid" staff under its Staff Rules and Regulations as well as ILO and human rights conventions. He submits that this was established by both the ESO's Rehabilitation Board and the Tribunal in Judgment 1665. The complainant contends that the Rehabilitation Board, in making its recommendation for an unsuitability pension, "relied on the performance of a Health Insurance, inclusive and at charge of the Organization, as natural element of the Rehabilitation measures proposed for the Complainant". The complainant also objects to the terminology used in Judgment 1718 that he "rejected" and "turned down" the Van Breda offer of continued health insurance coverage, a human right that he has been claiming for three years.

The complainant asks the Tribunal to quash the implied rejection of his appeal and order the ESO to provide him with health insurance coverage, award him material damages in the amount of five million United States dollars "for an ESO deliberate behaviour against his health rights", and moral damages of at least one million dollars for the Observatory's "deliberate perjuries and slander". He also claims costs.

C. In its reply the ESO objects to the complaint's receivability. The complainant was informed in August 1996 by the ESO that he was not entitled to the continuance of health insurance coverage but that Van Breda was nevertheless willing to grant him exceptional retroactive coverage. The complainant did not challenge that decision at that time and any further claim on that score is time-barred. The ESO did not re-examine the question of the complainant's health insurance upon receiving his letter of 9 February

1998; it merely forwarded the request to Van Breda and transmitted its reply to the complainant. There is, therefore, no new decision to challenge.

In subsidiary arguments the defendant pleads that the complaint is devoid of merit. The ESO is under no obligation to provide health insurance to former staff members. Under the Observatory's Rules and Regulations the health insurance scheme applies only to "members of the personnel" and not to a former staff member. The only option available to the complainant was to seek individual continuation of coverage.

D. In his rejoinder the complainant objects to the ESO's statement of facts. He denies having rejected an earlier offer of health insurance by the ESO, since the offer dated 27 February 1998 was the first evidence of a "real offer". In addition, the ESO never contradicted his estimates that the health insurance would cost between 2,500 - 5,000 marks which, he implies, constitutes bad faith. He rebuts the ESO's objection to receivability and, citing the Tribunal's case law, argues that receivability is not an issue when the organisation has acted in bad faith and misled the complainant.

Furthermore, he argues that the letter of 22 August 1996 did not constitute a final decision. He appealed against the decision to the Director General on 15 September 1996 but had to wait for the outcome of Judgments 1665 and 1718 before being able to appeal to the Tribunal against the denial of health benefits. He alleges that Articles R D 2.01, 2.03 and 2.06 of the Staff Regulations clearly oblige the ESO to provide him with these benefits.

E. In its surrejoinder the ESO presses its objection to receivability. The question of the complainant's health insurance was decided by the Tribunal in Judgment 1718 and he is no longer entitled to challenge the Observatory's decision. The ESO denies bad faith. Since the complainant's status as a staff member ended on 31 August 1995, he had no right to membership in the organisation's health insurance scheme but could seek continued coverage on an individual basis. However, he has twice declined Van Breda's offer.

CONSIDERATIONS

1. The complainant attacks an implied negative decision of the Director General of his former employer, the ESO, for refusing to reply affirmatively to his request that the ESO provide him with health insurance.

2. In two previous judgments – 1665 and 1718 – the Tribunal has already made a number of specific findings of facts with respect to the complainant's employment history and his subsequent dealings with his former employer. These may be summarised as follows:

(a) the complainant did not appeal against the ESO's decision not to renew his contract when it expired on 31 August 1995; it is accordingly not open to the complainant to argue that he was dismissed because of his disability (Judgment 1665 under 10);

(b) the complainant is not entitled to payment of an incapacity pension having neither been dismissed nor reclassified because of incapacity (Judgment 1665 under 11);

(c) the complainant was originally granted an unsuitability pension but later obtained *ex gratia* benefits equivalent to a 40 per cent partial incapacity pension; this, however, was not an incapacity pension (Judgment 1665 under 13 and 17);

(d) the complainant was informed in August 1996 that although he was not entitled to continued health insurance coverage through the ESO, the insurance brokers, Van Breda, were prepared to grant him coverage from September 1995 upon his paying 60 per cent of the normal premium; that offer was turned down by the complainant (Judgment 1718 under 4 and 5).

3. The complaint is clearly irreceivable. It was filed on 2 July 1998 and, as it appears from the Tribunal's earlier findings summarised above, in August 1996 the complainant had been offered – and refused – insurance coverage for 60 per cent of normal premiums. If he wished to contest the decision contained in the letter of 22 August 1996, he should have done so at that time. He cannot, by renewing his request, revive a claim which is long out of time.

4. The claim is, in any event, without merit. Under the terms of the applicable Staff Regulations, the ESO is under no obligation to provide health insurance to its former staff members. The complainant cannot now claim that he was dismissed for incapacity or that his present alleged handicap is the result of his working conditions.

5. The complainant's allegations of slander, bad faith and perjury made against the ESO are not supported by any evidence.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

***In re* Palma (No. 11)** **Judgment No. 1950**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 27 July 1998, the ESO's reply of 15 October, the complainant's rejoinder of 2 November and the Observatory's surrejoinder of 4 December 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian national, served on the staff of the ESO from 1 September 1989 to 31 August 1995. Further information about his career and facts relevant to this case are set out in Judgment 1665 of 10 July 1997 on his first complaint against the European Organization for Nuclear Research (CERN) and in Judgment 1718 of 29 January 1998 on his first complaint against the ESO.

A decision was taken on 26 January 1995 not to renew the complainant's contract when it expired on 31 August. In a letter of 30 June the Head of the Personnel Department informed the complainant of his entitlement to indemnities upon the termination of his contract.

Paragraph b) of the letter states "in accordance with Annex R A 10, page 4 of the Staff Rules and Regulations (edition 1 July 1983) you are entitled to a reinstallation grant amounting to 4 months' basic salary provided that a removal has been carried out and on the condition that either your spouse or at least one dependent child has taken up residence in your new abode". The complainant acknowledged receipt of the above in a letter of 5 July 1995 stating that he considers any payment of indemnities as "preliminary", reserving "final acceptance".

On 1 August 1997 the complainant wrote to the Director General requesting a waiver of the time limit under "Article R IV 1.43 of the ESO Rules and Regulations, i.e. concerning the indemnity of 'Removal Expenses'". Nevertheless, he contends that he carried out the removal before the end of the month. On 3 September 1997 the Head of Administration informed him that a waiver for claiming removal expenses had been granted until January 1998 even though the Director General had no obligation to do so under the exceptions specified in that Article. On 12 September 1997 the complainant acknowledged the extension, closing his letter with a hope that his "'removal' and related indemnity issue" might be resolved in a friendly manner. On 15 January 1998 this waiver was extended for an additional three months by the Head of Administration, pending Judgment 1718 which had not yet been delivered.

In a letter of 20 March 1998 the complainant wrote to the Head of Administration claiming his "indemnity of removal". Attached to his claim were copies of certificates of residence in Reggio Emilia, Italy, for himself and his two children, a fax from the moving company confirming the removal date, and an "invoice" in Italian from the same company acknowledging payment on 20 August 1997: no amount was indicated on the invoice. On 26 March 1998 the Personnel Services informed the complainant that he had not met the conditions of Article R A 11.02, point 1. Two reasons were given: he still indicated the same address in Germany and he did not provide proof of evidence that the removal was carried out. He responded in a letter of 29 March that he had mailed "all demanded documentation certifying [he] performed a removal and took residence beyond 20 km from [his] previous place of residence". Furthermore, he stated that the certificates of residence in Italy could only be obtained upon "sudden inspection of the municipal police at your address certifying your presence". He also provided the ESO with his mailing address in Italy. The ESO did not respond to the complainant's letter.

On 16 May the complainant appealed to the Director General claiming the "indemnity of removal" he had requested on 20 and 29 March. He invited the Director General to consult the Joint Advisory Appeals Board or to make a final decision by 16 July 1998. The complainant is impugning the implied rejection of his appeal.

B. The complainant contends that he complied with the applicable rules of the ESO. Article R IV 1.43 of the Regulations states that a staff member shall "be entitled to reimbursement of removal expenses if the removal takes place during the two years following ... the termination of his appointment if the distance in a straight line is 20 km or more". Article R A 11.02 provides for the entitlement of a reinstallation indemnity when "the provisions of Article R IV 1.43 [are] applicable to the member of the personnel, i.e. he [has] carried out a removal". The amount of the indemnity is higher for recipients of a household allowance, provided that "at least one member of the family (Article R IV 1.14) has taken up residence with the member of the personnel". For the purposes of this rule an unmarried child over 18 and under 25 years of age satisfies the definition of "member of the family". The complainant provided documentation showing that he had moved during the month of August 1997 and that he shared the same address in Italy with his two children, one of whom satisfies the requirements of Article R IV 1.14.

As for the German mailing address, he explains that he preferred to keep the same address for simplifying the correspondence regarding his numerous complaints to the Tribunal. Nevertheless, he had previously provided the ESO with his postal address in Italy.

The complainant contends that there are no rules stating how the physical removal and change of residence must be documented, and that he has provided the ESO with sufficient proof of his compliance with the applicable rules and regulations. He says that this is another open affront made against him by the ESO.

He asks the Tribunal to quash the implied rejection of his appeal against non-payment of the "indemnity of removal" and award him moral damages and costs.

C. In its reply the ESO points out that in each of his eleven complaints the complainant has given the same address in Germany. His name still appears on the door and the telephone book shows the same address and telephone number. In addition, the competent community registrar shows that the complainant is still registered in Germany.

It argues that the complainant's claim is to payment of the reinstallation indemnity according to Articles R IV 1.58 and R A 11.02 of the ESO Staff Regulations and that he does not request reimbursement of removal expenses. Had he met the statutory requirements he would have been entitled to four months' basic salary. However, the complainant has not provided sufficient proof of a removal. It argues that "he must show that he carried out the removal in accordance with the specific formal and substantive conditions of the Staff Regulations, such as set out in Art. R IV 1.50" and it contends that such proof has not been submitted to the Organisation.

The ESO argues that it still has good reason to believe that the complainant continues to live in Germany and that he uses the home of his daughter in Italy "as a subterfuge"; the invoice he submitted as proof of his removal is inconclusive because it does not mention the cost; and the Italian certificate of "family unit" does not mention his wife.

Finally, it pleads that the claim for payment of the reinstallation indemnity would be forfeited on any account. In order to qualify for this indemnity, the removal had to take place no later than 31 August 1997, and according to it the complainant had requested a waiver after this date. By his letter of 15 January 1998 the Head of Administration extended again the time limit for claiming removal expenses but not for claiming the reinstallation indemnity.

D. In his rejoinder the complainant seeks to refute the defendant's pleas which he finds insulting and outrageous. He says that "coming even to investigate the nameplate on the door" proves an "espionage made in [his] private life" on the part of the defendant. He argues that the ESO rules do not impose a change of postal address, but a removal; they do not require that a wife must follow her husband, but only specify that the staff member and one member of the family must change "formal" residences. The rules do not require the "physical elimination" of former staff members from the surrounding area. Furthermore, neither German nor Italian law prohibits multiple residences.

The complainant points to the ESO's letter of 30 June 1995 which stated that he was entitled to the reinstallation grant of four months' basic salary on the condition that a removal has been carried out and that either his wife or one dependent child has taken up residence in the new home. The payment for removal expenses and the reinstallation grant being "strictly linked" in Article R A 11.02 point 1, a claim for removal expenses can also be seen as a claim for the reinstallation grant thereby constituting what he calls the "removal indemnity". In addition, his own letter of 5 July 1995 informed the ESO that he would "consider the payment of all ... indemnities 'preliminary'" until a final decision on his case by the Tribunal. He argues that he has nevertheless "executed required removal and claim" in conformity with ESO rules.

He presses his arguments and argues in addition, that the Observatory did not cite Article R IV 1.50 as a reason for rejecting his claim on 26 March 1998.

E. In its surrejoinder the ESO raises a question of receivability: it objects to the complainant's broadening his original claim in the rejoinder. It contends that while the complaint initially "concerned the payment of the removal *indemnity* (reinstallation grant) and not the payment of the removal *expenses*" he now defines his claim to be for a "removal indemnity, i.e. removal expenses joined with the reinstallation grant". It understood "indemnity of removal" to mean payment of the reinstallation grant and not the reimbursement of any removal expenses.

CONSIDERATIONS

1. The complainant claims from his former employer, the ESO, a "removal indemnity" in accordance with the terms of Articles R IV 1.42, R IV 1.43 and R A 11.02 of the Staff Regulations. The relevant texts read as follows:

> "Article R IV 1.42
>
> When a member of the personnel travels to take up an appointment, on being transferred or reassigned to another duty station, on termination of his appointment, or on duty for a period of six months or more, the Organization shall reimburse the cost of transporting up to 30 kg of luggage per person by air freight from the airport of departure to the airport at the destination.
>
> Article R IV 1.43
>
> A member of the personnel entitled to the reimbursement of travelling expenses shall also be entitled to reimbursement of removal expenses if the removal takes place during the two years following:
>
> a) his appointment if the distance in a straight line is 20 km or more;
>
> b) his transfer or reassignment to another duty station;
>
> c) the termination of his appointment if the distance in a straight line is 20 km or more;
>
> except when his contract is for less than 12 months [cases a) and c)] or when he resigns during the first year [case c)], unless the Director General waives these restrictions. This entitlement shall be reduced if the Organization provides furnished housing at conditions to be specified by the Director General.
>
> Article R A 11.02
>
> Upon departure, a member of the personnel shall be entitled to payment of the indemnity indicated in the table below provided that:
>
> 1. The provisions of Article R IV 1.43 were applicable to the member of the personnel, i.e. he carried out a removal on his departure from the Organization ..."

2. Prior to the expiry of his term of employment at the ESO, the complainant resided in Germany. He continued his German residence after ceasing to be a member of the staff of the ESO. He has continued to indicate his address in Germany in his dealings with the ESO and on his various complaints to the Tribunal including the present one. He is registered with the competent authorities as a resident of the municipality of Neubiberg in Germany.

3. His claim to a "removal indemnity" is based upon the production of an invoice from a company apparently showing the carriage of certain effects to an address in Italy and a certificate from the Italian authorities showing that the complainant is also registered with the municipality of Reggio Emilia as a resident of that city in Italy.

4. The defendant denies the complainant's claim on the grounds that the evidence, coupled with the fact of the complainant's continued residence in Germany, was not sufficient to establish his entitlement to a "removal indemnity". Upon the complainant's appealing against such denial to the Director General and the latter's failure to provide a timely reply thereto, the complainant appealed to the Tribunal against the implied negative decision.

5. The complainant admits that he has a German residence where his wife resides and which he continues to show as a postal address in his dealings with his former employer and with the Tribunal. He claims that he has established a second residence in Italy and this fact entitles him to the "removal indemnity" which he has demanded.

6. It is not entirely clear from the complainant's original brief whether he is claiming reimbursement of removal expenses under Article R IV 1.43 of the Regulations or the payment of a reinstallation indemnity under Article R A 11.02. In his rejoinder the complainant attempts to remedy this by adding a clear claim to reimbursement of removal expenses. The defendant objects to this as an improper attempt by the complainant to alter the basis of his claim. It also objects to the claim for a reinstallation indemnity as being out of time since, unlike the claim for reimbursement of removal expenses, the ESO did not grant any extension to the complainant in this respect.

7. The Tribunal does not find it necessary to deal with these objections and prefers to deal with the claim on its merits.

8. It is obvious from a reading of the Regulations above that payment of the reinstallation indemnity is contingent upon the complainant being entitled to claim reimbursement of removal expenses. It is likewise clear that

the latter reimbursement is in its turn dependant upon the person claiming it having carried out a removal from his former residence.

9. In these circumstances the claim cannot succeed. So long as the complainant retains his residence in Germany, no matter how many other residences he may have established, he has not carried out a removal from that residence. A removal is not merely the establishment of a new residence but, and much more importantly, the abandonment of the former residence. On the complainant's own showing, he has not done so but continues to make use of it, both for the purposes of lodging members of his immediate family and for the purpose of conducting his business dealings.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

EIGHTY-NINTH SESSION

***In re* Müller-Engelmann (No. 7)** **Judgment No. 1951**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 14 July 1998 and corrected on 27 July, the EPO's reply of 22 October 1998, the complainant's rejoinder of 8 February 1999 and the Organisation's surrejoinder of 15 April 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The facts of this case and the pleadings have certain similarities with those set out in Judgment 1848 on the complainant's third complaint and in Judgment 1894 on her fourth, fifth and sixth complaints. At the material time she was employed by the European Patent Office, the secretariat of the EPO, in Munich, as an examiner at grade A3.

On 3 December 1997 the complainant submitted a claim for reimbursement of medical expenses totalling 5,589.40 German marks to the insurance brokers Van Breda, who are responsible for the day-to-day handling of the collective insurance contract concluded by the EPO. The sum of 1,913.14 marks was credited to her account on 8 January 1998.

In its settlement note dated 22 December 1997 Van Breda indicated that it was withholding reimbursement against seven invoices as it was waiting for additional information requested from her doctors. She lodged an appeal dated 9 February 1998 with the President of the Office against the non-reimbursement of those expenses within the fifteen-day time limit prescribed in Article 23 of the collective insurance contract and the fact that Van Breda had contacted her doctors directly to obtain information without first seeking her permission.

Van Breda wrote to the complainant on 13 March in connection with the invoices it had not reimbursed and informed her that it had contacted some of her doctors since its medical adviser needed a "medical report as well as the laboratory results proving the ascertained diagnosis". In a letter of 4 June the complainant told Van Breda that if it needed further information it should let her know and she would endeavour to obtain the necessary details from her doctors.

She subsequently filed her complaint with the Tribunal, inferring rejection from the EPO's failure to answer the claims in her appeal of 9 February, which she says was received by the defendant on 13 February 1998.

B. The complainant contends that her complaint is receivable under Article VII(3) of the Tribunal's Statute because the President did not take a decision within sixty days of the filing of her internal appeal as provided for in Article 109(2) of the Service Regulations.

On the merits she argues that Van Breda's failure to reimburse her medical expenses was unlawful. Her participation in the medical insurance offered through the EPO is compulsory and because of the nature of the collective contract the EPO is responsible for Van Breda's actions. The prescriptions and medical services detailed on the seven disputed invoices are subject to insurance coverage under Articles 16 and 20 paragraphs a) and b) 1.1 of the contract. She has never authorised Van Breda to contact her doctors directly and contends that it has no right to seek information from them regarding their diagnosis or treatment.

The complainant argues that Van Breda should have ordered reimbursement within fifteen days of receiving her claim. The bank transfer should have been made by 21 December and the amount of 3,676.26 marks should have been credited to her account no later than 28 December 1997.

She is therefore claiming the reimbursement of the seven invoices with 14 per cent interest from 28 December 1997. She asks the EPO to direct Van Breda not to contact her doctors for information about her treatment without her authorisation, to hand over to her all information it has received from her doctors and to give her a list of the doctors and hospitals it has contacted. She also claims costs.

C. In its reply the EPO submits that the complaint is not receivable because the complainant has not exhausted the internal means of appeal. The matter relates to a medical dispute and pursuant to the second paragraph of Article 90(1) of the Service Regulations it is the Invalidity Committee, rather than the Appeals Committee, which is competent to decide on such disputes. Because the complainant objected to her doctors imparting the details requested, Van Breda has still not received the information it requires in order to come to a final decision on the invoices. For that reason the standard procedure for medical disputes has not been followed in the complainant's case. Nevertheless, there is no indication that her internal appeal will not be heard within a reasonable amount of time, and therefore the conditions for filing a complaint under Article VII(3) of the Tribunal's Statute have not been met.

Subsidiarily it contends that her complaint is devoid of merit. Van Breda was entitled to make reimbursement dependent on a positive opinion from its medical adviser, who, in exercising his "right of control", is entitled to contact her doctors. As the complainant said in her rejoinder to her third complaint, the amounts which Van Breda refused to reimburse related to a diagnosis of poisoning – a matter raised in her first complaint. The medical adviser was justified in requesting further information from her doctors in order to establish the validity of their diagnosis. He will only be able to come to a final decision on the reimbursement when he has received this information, and the Invalidity Committee will only intervene if a refusal to reimburse leads to a medical dispute.

Article 23 of the collective insurance contract then in force required a bank transfer to be effected by Van Breda within fifteen days of receipt of a claim for reimbursement. In the complainant's case it should have been made by 21 December; but it was made just one day late, on 22 December, the date given on Van Breda's settlement note.

D. In her rejoinder the complainant seeks to rebut the defendant's pleas and argues that she is already entitled to reimbursement and the Appeals Committee is competent to hear her appeal. The complainant submits that she is not at fault if the standard procedure for medical disputes cannot be followed. The burden of providing the final decision cannot be shifted to her.

She submits that in querying her invoices Van Breda is seeking to prevent any confirmation of toxic pollution on the premises of the EPO.

E. In its surrejoinder the Organisation presses its objections to receivability and argues that by preventing Van Breda from receiving the information it required the complainant held matters up. She cannot now seek to benefit from Article VII(3) by saying her appeal has been implicitly rejected. She knew full well from the settlement note dated 22 December 1997 which invoices were in dispute and she could have intervened. Furthermore, receipt of her internal appeal was acknowledged on 6 April 1998, within the required time limit.

The Organisation points out that the alleged poisoning at the workplace is a separate matter which is being addressed by the Invalidity Committee and its opinion is expected soon. An earlier decision on that issue would have helped Van Breda's medical adviser to take a final decision on the matter of the disputed invoices; it was the complainant's uncooperative attitude that caused the delay.

CONSIDERATIONS

1. With the exception of variations in invoice dates and amounts claimed, the essential facts and the substantive issues in this case are identical to those already dealt with by the Tribunal in Judgments 1848 (*in*

re Müller-Engelmann No. 3) and 1894 (*in re* Müller-Engelmann Nos. 4, 5 and 6).

2. The insurance brokers, Van Breda, withheld reimbursement of seven claims submitted by the complainant on 3 December 1997, as it was waiting for additional information that had been requested by its medical adviser. The complainant refused to give permission for such information to be revealed. As was held in the above-mentioned judgments, Van Breda was entitled to the information.

3. As in those judgments, the Tribunal does not find it necessary to deal with the question of receivability, and the result must necessarily be the same as before.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-NINTH SESSION

***In re* Curina (No. 2)**
(Application for review)

Judgment No. 1952

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 1727 filed by Ms Brenda Curina on 23 February 1999 and corrected on 6 April, the reply of 9 July from the World Health Organization (WHO), the complainant's rejoinder of 12 October 1999 and the WHO's surrejoinder of 11 January 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 1727, delivered on 29 January 1998, the Tribunal disallowed the complainant's claim seeking to set aside the Director-General's decision confirming the abolition of her post and refusing to assign her to other employment. The Tribunal found that the Organization did not have to apply the reduction-in-force procedure to a post which the complainant knew to be of limited duration, that there were objective reasons for abolishing the post and that the procedure had not been misused.

2. By this application, the complainant asks the Tribunal to review this judgment. She contends that the Tribunal did not take into account certain facts which might have made it possible for her complaint to succeed

by proving that objective criteria had not been applied in the decision to abolish her post. She mentions form 172 headed "Notification of decision on position request" and says that the belated production of that form prevented her from arguing, as other WHO employees in similar situations had done, that her post was of unlimited duration. Finally, she submits that her legal arguments were not presented in a sufficiently effective manner by her former counsel and that this lack of assistance justifies her in applying for review of the judgment.

3. Consistent precedent has it that the Tribunal's judgments are final and without appeal and that they carry the authority of *res judicata*. It is only in quite exceptional circumstances that an application for review, although not provided for in the Statute, can be allowed: the only grounds which may be entertained are failure to take account of particular facts, a mistaken finding of fact that involves no exercise of judgment, omission to rule on a claim and the discovery of some new facts which the complainant was unable to invoke in time in the proceedings which led to the judgment which the complainant is seeking to reverse. The application for review should also be filed within a reasonable time and the pleas put forward should be of such a nature as to affect the original ruling.

4. In the present case, the Tribunal finds that none of the grounds exist for challenging the ruling already made. Irrespective of the fact, that her application for review was only filed more than one year after the adoption of the judgment that she is challenging – a matter which was not mentioned by the WHO – the complainant now merely calls into question the conclusions reached by the Tribunal. In so doing she contends that the Organization wrongly considered her service to be unsatisfactory and again attempts to demonstrate that the WHO's attitude towards her was governed by subjective factors, and that the abolition of her post was not brought about by financial constraints. Similarly, although she argues that a study of the information contained in form 172 would have proved that her post was without limit of time, the evidence shows that the form, which she says constitutes a new fact, had already been sent to her counsel at her request during the internal appeals procedure. The production of the form does not, therefore, by any means constitute the discovery of a new fact which could

afford valid grounds for review. Finally, the complainant states that she was not assisted effectively by her former counsel; this plea too, which is in any case of no relevance, does not warrant review of the Tribunal's judgment.

There being no need to order the hearings requested by the complainant, her application must be dismissed.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

***In re* Bonacci** **Judgment No. 1953**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Elvira Bonacci against the Food and Agriculture Organization of the United Nations (FAO) on 20 November 1998 and corrected on 1 March 1999, the FAO's reply of 13 May, the complainant's rejoinder of 23 September and the Organization's surrejoinder of 30 November 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1951 in Italy of Italian parents. When she was one year old her family emigrated to Australia. In 1958 her father acquired Australian citizenship, which was thereby conferred on his dependent children under the age of majority. According to the complainant, she then lost her Italian citizenship, dual nationality not being allowed under Australian law. In 1967 she married an Italian thereby acquiring again Italian nationality. In February 1971 she applied for and obtained Australian nationality which she says she had lost when she married.

She joined the FAO in Rome on 8 June 1971 as a clerk at grade G.2 with local status and under a short-term appointment. The Organization submits that, at that time, she declared herself only as an Italian national, whereas the complainant asserts that she gave the FAO a copy of her Australian passport.

By Bulletin No. 71/15 of 19 March 1971, the Director-General had announced his decision to revoke, as of 1 April, a provision of the Staff Rules under which staff members lost their non-local status upon marrying an Italian. Accordingly, by an addendum to that Bulletin dated 10 September he revoked Staff Rule 302.40611(ii), under which a woman married to a national of the country of the duty station was automatically recruited as local staff. The addendum stated that staff members who, at the time of recruitment, had been given local status under the Rule in question would have their status converted to non-local as from 1 October 1971.

On 1 October 1972 the FAO gave the complainant a fixed-term appointment for two years and, on 1 August 1974, a permanent appointment and a promotion to grade G.3. By a memorandum dated 16 September 1974, the complainant applied for non-local status citing the addendum to Bulletin No. 71/15 and cases similar to her own, explaining that she had not done so before because she had only been on monthly contracts. On 21 January 1975, a personnel officer asked her to provide evidence that she had lost her Italian nationality upon acquiring Australian citizenship. According to the Organization this request went unanswered whereas the complainant alleges that she submitted a letter from the Australian Embassy certifying that she had Australian nationality.

She applied again in a memorandum of 3 October 1977, to which she attached a certificate of Australian citizenship, a photocopy of her passport dated 16 February 1971 and an attestation from the Australian Embassy in Rome certifying that "when a person acquires Australian citizenship he renounces any allegiance to former countries". By a memorandum of 24 October 1977 a personnel officer acknowledged receipt of the documents but said that she had still produced no evidence that she had lost her Italian nationality prior to the date of her marriage.

By a memorandum of 1 April 1996 the complainant again applied for non-local status. On 6 May a personnel officer referred to the memorandum of 24 October 1977 and again asked the complainant for evidence that she had lost her Italian nationality prior to her marriage. In a memorandum dated 24 September 1996, the complainant replied that even though she had twice acquired Australian citizenship – in 1958 and in February 1971 – the Italian authorities had considered the renunciation of her Italian nationality to be of no legal value in Italy because a law of 1912 stipulated that a woman could not have a different nationality from that of her husband. On 3 October 1996 a personnel officer sent a confidential memorandum to the Director of the Personnel Division explaining the background of the complainant's case, noting that she had been given erroneous information in 1975 and 1977. She should have been asked to prove that she had acquired Italian nationality involuntarily rather than that she had lost it before her marriage. She had now produced the relevant evidence. However, in a memorandum dated 20 May 1997, the same personnel officer informed the complainant that her local status was confirmed since she had been recruited on the understanding that she was Italian – had she not been, the FAO would not have recruited her at all – and that under the Italian law she had remained an Italian.

On 12 August she filed an appeal with the Director-General against that decision. The Deputy Director-General rejected it on the latter's behalf in a letter of 22 September, on the grounds that it was irreceivable because she had failed to observe the prescribed time limits, having waited twenty years before re-applying. On 20 October 1997 the complainant appealed against that decision to the Appeals Committee. In its report of 30 June 1998 the Committee recommended rejecting the appeal as time-barred. The Director-General endorsed the recommendation in a letter of 24 August 1998. That is the impugned decision.

B. First, the complainant denies that her internal appeal was time-barred: neither in 1975 nor in 1977 had the FAO taken a decision, but had merely asked her to supply evidence. Furthermore, the FAO has never mentioned the possibility of a time-bar and, in any event, had taken the matter up again in 1996.

Secondly, the complainant alleges a mistake of law. She had fulfilled the requirements for obtaining non-local status since 1974: she had not acquired Italian nationality voluntarily and had never renounced her Australian nationality. She claims to have met the criteria established by the Tribunal for the grant of non-local status. She accuses the FAO of breach of good faith. The matter of the loss of her Italian nationality before her marriage was immaterial, and the Administration had concluded in an internal note of 14 October 1977 and in a confidential memorandum of 3 October 1996 that her application was well-founded, but had nonetheless rejected it. Furthermore, the FAO was in breach of equal treatment as other staff in a similar position had had their local status converted to non-local.

She asks the Tribunal to quash the impugned decision and order the Organization to grant her non-local status with retroactive effect as from 1 August 1974. She also claims costs.

C. In its reply the FAO objects to the receivability of the complaint on the grounds that someone who neglects to assert his rights or accepts a given situation over a long period is automatically deprived of the possibility of asserting them. The complainant failed to observe the time limit for internal appeals: not until September 1974 did she challenge the decision taken at the time of her recruitment on 8 June 1971. Moreover, the impugned decision merely confirms the decision taken in 1971 and so cannot set off a new time limit.

In subsidiary pleas, the FAO submits that the complaint is devoid of merit because the complainant clearly claimed Italian citizenship as her only nationality when she was recruited and for several years kept the Organization in ignorance of her other nationality. Neither the addendum to Bulletin No. 71/15 and Staff Rule 302.40611(ii) to which it refers, nor the judgments cited by the complainant are material since they concern non-Italian women staff members who married Italians. The complainant's local status was determined on the basis of Staff Rule302.40611(i) because she was a national of the country of the duty station. The confidential memorandum, which was favourable to her, was written by the personnel officer for whom she worked directly, and did not reflect the Organization's position. Lastly, the FAO observes that, according to the Staff Rules, it is the Director of the Personnel Division who determines, for the purpose of the application of Staff Rules and Regulations the nationality of a staff member with more than one nationality.

D. The complainant rejoins that she did not neglect to assert her rights and never accepted the situation. On the contrary, as soon as she obtained a fixed-term appointment and hence benefited from the Staff Rules, she requested non-local status and thereafter reiterated her request. Furthermore, the internal note of 14 October 1977 which found her request to be warranted, constituted a "new fact" and the memorandum of 20 May 1997, which she says contained "new grounds", notified the result of a "new inquiry".

She submits that in 1971 the FAO's practice was to award local status systematically to staff members married to Italians and recruited on short-term appointments, regardless of their nationality. She cannot, as the FAO asserts, have been granted local status on the basis of any provision of the Staff Rules, since they did not apply to staff on short-term appointments. She denies hiding the fact that she was Australian: she supplied a copy of her Australian passport at the time of her recruitment. Moreover, the FAO's arguments suggesting that the author of the confidential memorandum lacked objectivity are quite gratuitous. She presses her pleas concerning staff members whose position she considers to be similar to her own and who obtained non-local status.

E. In its surrejoinder the Organization repeats that the complainant was recruited as an Italian and considers that her case has "no *raison d'être* in terms of the law". To allow the complaint would be to undermine the stability that must exist in legal relations. Here, the references to the Organization's past practice are immaterial and in the only case similar to hers, the FAO had misapplied the Staff Rules.

CONSIDERATIONS

1. The complainant appeals a decision of her employer, the FAO, rendered on 24 August 1998, by which her claim to be granted non-local status with retroactive effect as from 1 August 1974 was dismissed as irreceivable.

2. The complainant was born of Italian parents in Italy in 1951. While she was still an infant, her parents emigrated to Australia where her father acquired citizenship in 1958. The complainant asserts that under Australian law, her father's naturalization also had the effect of conferring Australian citizenship upon her. Furthermore, she asserts that under Australian law, it was not possible to have dual citizenship and that she was therefore deemed to have lost her Italian citizenship upon her father's naturalization. There is evidence to the effect that, under Italian law, she was not considered to have lost her Italian citizenship by the mere fact of having acquired Australian nationality.

3. On 1 March 1967 when she turned 16, the complainant reasserted her right to be an Australian citizen pursuant to Australian law. A few days later, on 4 March 1967, she married an Italian national. Under an Italian law in effect at that time, a woman marrying an Italian national automatically and obligatorily acquired her husband's nationality. In consequence, if she had ever ceased to be one, the complainant again became an Italian citizen. She again purported to obtain Australian citizenship in February 1971.

4. In 1971, the complainant returned to Italy travelling on an Australian passport. Notwithstanding this, she was viewed by the Italian authorities as being an Italian national.

5. The complainant joined the staff of the FAO in June 1971 on a short term contract at grade G.2 as a local staff member. Although a copy of her Australian passport was in her personnel file, the complainant signed a number of documents and other declarations in which she indicated that she was an Italian citizen and that her domicile was in Rome. Since it appears that the Organization would not have hired her had she not been an

Italian citizen, the complainant seems to have taken advantage of her situation to claim the benefits of both Australian and Italian citizenship.

6. After a series of short-term appointments the complainant, on 1 October 1972 obtained a two-year appointment at grade G.2 expiring on 30 September 1974. On 1 August 1974, she was promoted to grade G.3 and given an indefinite appointment. In this latter, as in all previous appointments, her status was that of a local staff member.

7. On 16 September 1974, the complainant wrote to the Personnel Division requesting that she be given non-local status in virtue of current FAO policies under which female foreign nationals who were regarded by Italian law as having acquired Italian citizenship, albeit involuntarily on their part, were nonetheless treated as retaining their original nationality. These policies had been inaugurated in April 1971, just prior to her first engagement, and finalised in September 1971 just after that time. She cited the cases of a number of co-workers which she said were similar to hers. She explained that she had not sought non-local status at the time of her original engagement since she had only been on short-term contracts at grade G.2. In its reply dated 21 January 1975, the Personnel Division advised her that "to enable us to review the matter you should provide us with appropriate evidence that you actually lost your Italian nationality upon acquisition of Australian citizenship".

8. The record reveals that the complainant did not reply to this last communication until 3 October 1977 when she wrote again to the Personnel Division stating that she had produced further evidence "that I did not lose my Australian nationality after my marriage". She referred again to her Australian passport and to a statement from the Australian Embassy to the effect that, under Australian law, acquisition of Australian citizenship automatically involves renunciation of any foreign allegiance.

9. This latter communication was acknowledged by the Organization on 24 October 1977 in a memorandum addressed to the complainant, the last two sentences of which read as follows: "However, you have so far not produced evidence that you lost your Italian nationality prior to the date of

your marriage. Therefore, before we can review the matter further, I would ask you to let me have the relevant document".

10. The complainant did not raise the matter again until 1 April 1996 when she wrote once more to the Organization seeking to convert her status to non-local. In a reply dated 6 May 1996 she was referred to the earlier memorandum of 24 October 1977 and asked once again to produce the evidence requested therein. The complainant responded on 24 September 1996 by citing cases of other persons whom she considered to be in a situation similar to hers and who had been granted non-local status. On 20 May 1997, the Organization informed her that "your status is to remain unchanged". After indicating that she had been recruited as local staff and would not have been recruited had she not claimed to have Italian nationality, the document continues: "Although you may have renounced Italian citizenship under Australian law, you are by your own admission considered to be an Italian national pursuant to Italian law". Finally, the memorandum refers to Staff Rule 302.4082 which allows the Organization, in cases of dual nationality, to designate the State with which, in its opinion, the staff member is most closely associated.

11. The complainant appealed the foregoing decision to the Director-General who, on 22 September 1997, dismissed the appeal as being both irreceivable and unfounded on the merits. On a further appeal to the Appeals Committee, the latter recommended by a majority that it be dismissed as irreceivable, a recommendation accepted by the Director-General in the decision dated 24 August 1998 which is now under challenge.

12. The responses given by the Administration to the complainant's requests for non-local status in both 1975 and 1977 were clear and unambiguous. They were also well founded in law. The evidence of her Australian citizenship was not enough: she must also show that she had lost her Italian citizenship prior to her marriage to an Italian citizen.

13. The Administration's decisions of 1975 and 1977 do not differ in any material respect from the decision of May 1997 which confirmed them

and which forms the basis of the present complaint. In each case, the Administration refused to grant the complainant non-local status unless and until she provided evidence that Italian law had ceased to regard her as an Italian citizen prior to her marriage. However, each of the Administration's requests remained unanswered: the complainant did not and still has not furnished the evidence requested. That state of affairs has continued before the Tribunal. In the absence of new evidence from the complainant, the Organization was under no obligation to re-examine the status she has held since 1971.

14. The complaint must accordingly be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

JEAN-FRANÇOIS EGLI

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

Judgment No. 1954

***In re* Newhall**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms Jenny Newhall against the Pan American Health Organization (PAHO) on 2 February 1999 and corrected on 18 March, the PAHO's reply of 28 June, the complainant's rejoinder of 11 August and the Organization's surrejoinder of 22 October 1999;

Considering the comments submitted by Ms P. on 24 January 2000 at the Tribunal's request, the complainant's observations thereon of 23 February and the Organization's final comments of 17 March 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Bolivian national born in 1957, joined the staff of the PAHO in 1978. She holds a career-service appointment and is currently a G.5 with the Analysis and Strategic Planning Unit.

On 5 June 1997 a vacancy notice was issued for a G.6 post – 4162 – as an office technician in the Division of Health and Human Development. The post required, inter alia, "very good knowledge of English and Spanish" as well as "word processing in English and Spanish in accordance with established standards". The complainant, one of twelve applicants, applied for the post on 6 June. Ms P., a short-term consultant with the PAHO from November 1992 until 7 October 1997, was one of the other candidates; she was treated as an internal candidate throughout the selection process. Her mother tongue is English.

The Selection Committee met on 14 October 1997. It did not request any additional information regarding Ms P. nor did it question her qualifications. None of the applicants was tested for typing or language skills during the selection process. The Committee unanimously recommended Ms P. for post 4162.

On 23 October the Personnel Department informed the complainant that Ms P. had been recommended for the post. She was officially assigned as of 27 October 1997.

The complainant appealed to the Headquarters Board of Inquiry and Appeals against the appointment of Ms P. to post 4162, claiming that Staff Regulation 4.4, which requires that "vacancies shall be filled by promotion of persons already in the service of the Pan American Sanitary Bureau in preference to persons from outside", had been violated. Although the Board concluded that Ms P. was an external candidate at the critical date, i.e. that of the Selection Committee meeting, it found that Staff Regulation 4.4 did not apply because she was unanimously considered better qualified than all the other applicants. Based on these findings the Board did not recommend cancelling the appointment or beginning a new selection process.

By a letter of 3 November 1998 the Director of the PAHO informed the complainant that he had "accepted the conclusions and recommendations of the Board of Appeal to confirm the selection of Mrs P.". That is the impugned decision.

B. The complainant argues first that the successful candidate did not meet the minimum requirements of post 4162 and contends that this violates the Tribunal's case law and the principle of the merit system of employment. Ms P.'s typing and Spanish language skills were never tested. The complainant points out that on an evaluation form dated 1994 Ms P.'s grasp of Spanish was indicated as "marginal" and that in 1999 she was enrolled in a Spanish class which was only at the intermediate level; therefore, it is impossible that Ms P. possessed a "very good knowledge of Spanish" at the time of appointment.

Secondly, the report of the Board of Inquiry and Appeals concluded that Ms P. was an external candidate, since her contract as a consultant had ended one week before the Selection Committee met. Therefore, the complainant should have been given preference in accordance with Staff Regulation 4.4. She disputes the Board's conclusion that Staff Regulation 4.4 did not apply, arguing that it was based on unverified information regarding the successful candidate's qualifications.

Finally, since the PAHO has admitted that it did not verify the successful candidate's qualifications, it should have for that reason alone and as a matter of principle, set aside the appointment and repeated the selection process.

The complainant asks the Tribunal to find that Ms P. did not meet the requirements for Spanish proficiency and for word processing in both English and Spanish, that she was an external candidate and that Staff Regulation 4.4 should have been applied, and to order that her appointment to post 4162 be set aside and a new selection process begun. In addition, she claims payment of damages and costs.

C. In its reply the PAHO states that it adhered to all the applicable rules and procedures in the selection process. It rebuts the complainant's argument that the successful candidate should have been tested for proficiency, stating that, since "typing tests are administered for entry level (G1-G3) secretarial post where the candidate does not have a record with the Organization", none of the candidates was tested. Furthermore, short-term consultants are hired for specific skills and expertise which they are presumed to possess. Post 4162 is a G.6 post and Ms P.'s abilities were attested to by her employment record and evaluations over four years with the PAHO.

The defendant further submits that Ms P. met all the minimum requirements of post 4162 and that the complainant has based her allegations about Ms P.'s language skills on an evaluation of 1994, made three years before the selection for the post. Ms P.'s 1996 Personal History Form, which required her signature confirming its accuracy, reflected that she possessed the Spanish skills necessary for the post. The defendant also points out that Ms P. was given consecutive contract renewals.

The PAHO argues that the complainant was not chosen for the post because she was not the best qualified. Ms P. was considered a superior candidate because of her graduate training and her excellent performance during her four years of work in the Division. The complainant's educational background and other skills were not sufficient to put her on the short list. The defendant also points out that neither the two other short-listed candidates, nor any other candidate, has challenged the selection and appointment of the successful candidate.

It denies that Staff Regulation 4.4 was applicable to this appointment. It only applies in instances of a tie between external and internal candidates, "where all other things are equal". Ms P.'s educational background and work experience made her the most qualified candidate and the Selection Committee unanimously recommended her selection. The PAHO adds that to consider Ms P. as an external candidate while she was on a mandatory contract break for short-term consultants "misconstrues PAHO rules and regulations, and would result in a travesty of basic logic and justice".

Furthermore, the defendant states that the complainant provides no evidence that she was better qualified than Ms P. or that the information on Ms P.'s Personal History Form was inaccurate.

D. In her rejoinder the complainant claims that the question is not whether Ms P. met the requirements of the post, but rather what actions the defendant took to check her qualifications. She presses the argument that Ms P.'s qualifications were never objectively verified. Consequently, it was not possible to find her to be the most qualified candidate and Staff Regulation 4.4 should have been applied. The complainant objects to the fact that the PAHO relied heavily on subjective evaluations of Ms P.'s qualifications: concrete indicators are better for evaluating candidates than words such as "wonderful" and "very good". She highlights the inconsistent policy that the PAHO has taken as to whether Ms P. was an internal candidate at the time of the Selection Committee meeting.

E. In its surrejoinder the PAHO maintains that all rules and procedures were properly applied in the selection of the successful candidate. The complainant confuses the difference between testing and verification of a candidate's qualifications. Qualifications of candidates with a work history at the PAHO can be checked by a variety of methods other than tests, whereas those unknown to the PAHO must often be tested. There was no need to test the successful candidate because she had a solid work history at the PAHO. The complainant has focused only on the language and typing requirements for post 4162, disregarding the fact that other skills, such as very good organization, coordination, research and analysis, were also minimum requirements for the post.

F. In comments on the pleadings submitted at the Tribunal's request Ms P. points out that the complainant does not know her personally nor is the complainant familiar with her work and objects to the fact that, nevertheless, the complainant is "permitted to taint [her] professional reputation". As for her language skills, she states that she was required to pass a Spanish proficiency test as part of her Master's degree and that she has lived one year in Spain. She provides the Tribunal with other factors relevant to her professional abilities.

G. In her observations the complainant admits that she knows Ms P. by reputation only. Despite the fact that Ms P. had been given the opportunity by the Tribunal to submit evidence of her qualifications and achievements, her letter makes claims that are once more not supported by evidence. Since Ms P. was given a copy of the complaint, she should have been aware that "the issue of verification lay at the heart of the matter".

Although the complainant presses her claim that the selection of Ms P. should be set aside, she also expresses the hope that the PAHO will take steps to ensure that Ms P. suffers no material injury as a result, as it was the Administration that did not properly adhere to its own selection procedures.

H. In its final comments the PAHO objects to the fact that the complainant's counsel has tried to use the further submissions to continue arguments on the merits. It was the Organization's understanding that the Tribunal's invitation was to give Ms P. an "opportunity to express her personal views on the Complaint", and it was not for the complainant to comment on the merits. It contends that there was no need for Ms P. to attach copies of any diplomas or certificates to her letter, as such information can be found in her personnel file.

CONSIDERATIONS

1. The complaint relates to the selection process for a vacant post in the Division of Health and Human Development at the PAHO, to which the candidate recommended by the Selection Committee was appointed.

2. The complainant argues that the successful candidate, Ms P., did not have a very good knowledge of Spanish at the time of her appointment. The complainant cites a 1994 appraisal report which indicated that Ms P.'s grasp of Spanish was only marginal. She mentions the fact that as of 1999 Ms P. was enrolled in an intermediate level Spanish class. The complainant also claims that Ms P.'s language and typing skills were not objectively verified by testing; in addition, Ms P. was listed as an internal candidate during the selection process when she was really an external candidate.

3. The Organization replies that none of the candidates was tested for language or typing skills at the time of selection. It says that during her employment with the Organization for four years, Ms P. had been able to use the Spanish language and word processing to the satisfaction of all known to her. Her supervisor in the Division of Health and Human Development, confirmed in a memorandum of 30 April 1998 that her proficiency in the Spanish language and the typing duties associated with the post fulfilled the terms of the job description which he had assisted in drafting.

4. The Organization claims that Ms P. was listed as an internal candidate on the basis of her continuous short-term contracts during four years prior to selection. Her previous contract expired one week before the Selection Committee meeting. In the selection process the Director of the Division concerned was sent a list of all the candidates by the Department of Personnel and was asked to draw up a short list. Ms P. was one of three

preferred candidates who completely fulfilled the requirements of the post. The complainant was not one of the preferred candidates. The Selection Committee, which met on 14 October 1997, unanimously recommended Ms P.

5. The complainant has not proved that Ms P. did not meet all the requirements of the post.

6. The only question is whether it is relevant that Ms P. was listed as an internal candidate when her short-term contract had run out a week before the Selection Committee meeting. In the opinion of the Tribunal it is immaterial. Staff Regulations 4.2 and 4.4 provide:

> "4.2 The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence, and integrity ...
>
> 4.4 Without prejudice to the inflow of fresh talent at the various levels, vacancies shall be filled by promotion of persons already in the service of the Pan American Sanitary Bureau in preference to persons from outside."

7. The correct interpretation of Staff Regulation 4.4 is that persons already in the service of the Organization have priority only if their qualifications appear to be equal to those of other candidates (see Judgment 107, *in re* Passacantando). Since the complainant was found not to be as well qualified as Ms P., she cannot rely on Regulation 4.4.

8. The complaint therefore fails.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Essers**

Judgment No. 1955

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Maria Gerarda Essers against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 12 August 1998 and corrected on 26 March 1999, Eurocontrol's reply of 26 July, the complainant's rejoinder of 20 September, her amendment thereto of 20 October and the Organisation's surrejoinder of 3 December 1999;

Considering Articles II, paragraphs 5 and 6, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch citizen, is the former wife of Mr Leonardus Hubertus Julius Geurten, a deceased Eurocontrol official. He was on active service with Eurocontrol from 1973 to 1 June 1993, at which point he was granted an invalidity pension. He died on 22 July 1994.

The complainant married Mr Geurten in 1960. In a letter dated 18 March 1988 the complainant informed Eurocontrol that Mr Geurten was required to pay her a monthly allowance pursuant to an interlocutory order. However the final divorce decree pronounced on 19 April 1990 did not grant her a monthly maintenance allowance. The complainant agreed to a lump sum payment of 90,000 Dutch guilders "in full and final settlement of her spouse's legal obligation to pay her maintenance" in a recorded divorce settlement of 20 December 1989. This payment was satisfied by her former husband and monthly payments were ceased.

On 4 August 1994 the complainant wrote to Eurocontrol concerning an application for a survivors's pension. On 19 August 1994 Eurocontrol replied that she was not entitled to a pension under Article 27 of Annex IV of the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre, which provides that "the divorced wife of a servant or a former servant shall be entitled to a survivor's pension, as defined in this chapter, provided that, on the death of her former husband, she can justify entitlements on her own account to receive maintenance from him by virtue of a court order or as a result of a settlement between herself and her former husband".

In a letter of 16 January 1996 her legal counsel forwarded the record of the mutual agreement to Eurocontrol, again inquiring about the complainant's entitlement to a survivor's pension. On 23 January 1996 the Head of the Pensions Section confirmed the refusal dated 19 August 1994. On 25 March 1996 the complainant requested the relevant provisions of the General Conditions of Employment; these were subsequently sent to her.

On 10 July 1996 her counsel disputed the contents of the refusal letter of 23 January and informed Eurocontrol that the complainant had agreed to the 90,000 guilders lump sum payment from her ex-husband in lieu of monthly maintenance payments while maintaining a reservation on her rights to a survivor's pension. In a letter of 13 August the Head of the Pensions Section reaffirmed the decision denying the survivor's pension.

On 18 February 1997 the complainant once again applied to Eurocontrol for a survivor's pension. In a letter of 7 October her legal counsel urged Eurocontrol to take action regarding this application and said that if this were not done she would bring an appeal. On 20 October 1997 Eurocontrol sent her counsel information on the procedures for filing complaints, the relevant provisions of the General Conditions of Employment, and the Tribunal's address. On 17 February 1998 her legal counsel submitted a request to the Director General that he award the survivor's pension. On 2 June the Agency rejected this request. That is the impugned decision.

B. The complainant argues against the Agency's interpretation that the lump sum payment she agreed to cannot be considered as alimony. She submits that the difference between a monthly maintenance payment and lump sum payment is "juridically irrelevant" and that both should be considered as "meeting the cost of living". She admits that she withdrew her request for monthly maintenance payments upon acceptance of the lump sum payment from her former husband, but reserved her right to claim his pension. She argues that the method of payment does not affect the legal obligation to pay maintenance.

She contends that under Dutch law she has a right to the survivor's pension because Dutch law bases the right on payment of the premium and the number of years married and is not conditioned on an award of monthly alimony payments. By applying the Organisation's rules over national legislation surviving spouses of Eurocontrol officials are discriminated against compared to other Dutch citizens.

She asks the Tribunal to quash the decision denying her a survivor's pension and to order the Agency to pay her such a pension.

C. In its reply Eurocontrol objects to the receivability of the complaint on two separate grounds. First, it argues that the complaint is time-barred as the impugnable decision was communicated in the letter of 19 August 1994. Therefore the legal counsel's letter of 17 February 1998, appealing that decision, was out of time.

Secondly, even if it could be argued that the letter of 17 February was not time-barred, the complaint would still be irreceivable because the complainant has failed to exhaust all internal remedies before filing a complaint with the Tribunal.

Subsidiarily, it pleads that the complaint is without merit. The complainant accepted the 90,000 guilders as "payment in full" and in doing so also waived her application for maintenance. Since she was not receiving a monthly maintenance payment from her former husband at the time of his death she does not satisfy the requirements of Annex IV, Article 27, of the General Conditions of Employment.

D. In her rejoinder the complainant contests that the complaint is irreceivable. She says that the 19 August 1994 rejection of her claim did not inform her that she could submit a complaint or the applicable time limits for filing one; it was not until 28 January 1998 that her counsel received the final answer that it was the Agency, and not the Dutch judicial system, that had jurisdiction over the matter. She then duly filed her internal complaint on 17 February. Any correspondence before that time constituted "preparations to the internal complaint".

E. In its surrejoinder Eurocontrol notes that the complainant does not refute the facts as set out by it. It maintains that the complaint is time-barred and that the complainant's reasons justifying her delay, of several years, are not relevant.

On the merits it argues that the complainant has provided neither a court order nor any other proof that there was a settlement between herself and her former husband that would satisfy the requirements Annex IV, Article 27, of the General Conditions of Employment.

CONSIDERATIONS

1. The complainant is the divorced wife of a Eurocontrol official who died on 22 July 1994. On 4 August 1994, following a telephone conversation, she sent a letter to Eurocontrol containing information concerning her application for a survivor's pension. On 19 August 1994 the Agency informed the complainant that, in accordance with the statutory regulations in force, the divorced wife of a servant or former servant of Eurocontrol was only entitled to a survivor's pension if, at the date of the death of her former husband, she could justify entitlements to receive maintenance from him by virtue of a court order or as a result of a settlement between the former spouses. The Agency received a copy of a settlement between the former spouses, concluded on 20 December 1989 at the Maastricht District Court, stating that the husband had fulfilled his

maintenance obligations through the immediate payment to the complainant of a sum of 90,000 guilders. The Head of the Pensions Section confirmed on 23 January 1996 that a survivor's pension could only be granted to the divorced widow of an official if she was entitled to a maintenance pension at the time of her former husband's death and that, as the complainant had received a lump sum in full and final settlement, she was not entitled to such a pension. Following several exchanges of letters and a failed appeal to the European Ombudsman, the complainant's legal counsel submitted a request for a decision to the Director General on 17 February 1998. This was rejected on 2 June by a decision in which Eurocontrol confirmed that the complainant did not meet the conditions for entitlement to a survivor's pension set out in Annex IV, Article 27, of the General Conditions of Employment. That is the decision impugned in a complaint filed with the Registry of the Tribunal on 12 August 1998 and subsequently corrected.

2. Eurocontrol puts forward two pleas of irreceivability. Firstly, the decision not to grant the complainant's application was taken on 19 August 1994 and, in accordance with Article 91(2) of the General Conditions of Employment, should have been challenged internally within three months. Secondly, even if the letter of 17 February 1998 "had constituted a receivable request", the complainant should have then lodged an internal complaint, which she did not do.

3. Whatever the validity of these pleas, the Tribunal will not rule on them, since the complaint must in any case be dismissed on the merits. As Eurocontrol indicated to the complainant on several occasions, the relevant text is Annex IV, Article 27, first paragraph, of the General Conditions of Employment, which provides that:

> "The divorced wife of a servant or a former servant shall be entitled to a survivor's pension, as defined in this chapter, provided that, on the death of her former husband, she can justify entitlements on her own account to receive maintenance from him by virtue of a court order or as a result of a settlement between herself and her former husband."

It is plain on the evidence that the settlement agreed to by the former spouses at the Maastricht District Court in December 1989 implied that the payment of a lump sum to the complainant by her husband was in full and final settlement of any obligation upon the latter to pay maintenance. Under this settlement, the parties agreed that "the husband will have fully met his maintenance obligations towards his wife if he pays her 90,000 guilders immediately". Following the payment of this sum, the wife withdrew her initial application for monthly maintenance, as certified by the divorce decree pronounced on 19 April 1990. Therefore, Eurocontrol was right in deciding that the complainant was no longer entitled to maintenance on the death of her former husband and could not claim the benefit of Annex IV, Article 27. To avoid this the complainant refers to the reservations that she says she or her legal counsel made on the occasion of the court settlement in 1989. However, no trace of these reservations is to be found either in the settlement or in the divorce decree. Moreover, the fact that the legal counsel of her former husband stated in October 1999 that the latter did not at the time intend to "cancel" her right to a widow's pension cannot interfere with the application of the statutory provisions which set out the rights of Eurocontrol officials and their dependants. Finally, even if the complainant maintains that Dutch law would permit the provision of an old-age pension to a surviving spouse, irrespective of the maintenance which could be claimed by the latter, this does not affect the application of the above statutory provisions.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

***In re* Ochani (No. 8)** **Judgment No. 1956**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr Parmanand Sachanand Ochani against the World Health Organization (WHO) on 26 December 1998 and corrected on 13 January 1999, the WHO's reply of 9 April, the complainant's rejoinder of 4 May and the Organization's surrejoinder of 26 July 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of India, is a former official of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. Under circumstances explained in Judgment 1856 delivered on 8 July 1999 on his second complaint his service was terminated for misconduct with effect from 5 August 1996.

Staff Rule 1075.1 provides in part that when a staff member is dismissed for misconduct: "The staff member shall be given one month's notice. The Director-General may grant him an indemnity not exceeding one-half of that payable under Rule 1050.4. No end-of-service grant is payable".

In a letter of 16 April 1997 to the Regional Director the complainant requested payment of a termination indemnity. On 30 April the Personnel Officer at SEARO rejected his request on the Director's behalf. He pointed out that Rule 1075.1 uses the words: "The Director-General *may* grant", and that therefore the grant of the indemnity is discretionary. He further told the complainant that a final decision had already been taken on the matter and had been conveyed to him in the letter of 31 July 1996 informing him of his dismissal. On 26 May 1997 the complainant appealed to the regional Board of Appeal against the decision not to pay him the indemnity. After it had received a statement from the Organization, the Board contacted the complainant on 31 July allowing him five days to file a rejoinder. The complainant says he submitted one on 7 August but then heard no more. The Organization states that no rejoinder was received and that the regional Board sent two reminders to the complainant dated 25 August and 15 September 1997.

The parties concur that on 29 October 1998 the complainant notified his intention to appeal to the headquarters Board of Appeal. On 4 November the Secretary of the Board informed him that, before proceeding, she was contacting the regional Board to find out the status of his appeal. She wrote to him again on 6 January 1999, informing him that in the absence of an answer from SEARO by 18 January the headquarters Board would deal with his appeal.

Her inquiry revealed that as the regional Board had not received a rejoinder from the complainant it had not taken up his appeal. The Secretary informed him on 20 January 1999 that if she did not hear from him within fifteen working days the headquarters Board too would assume that he wished to withdraw his appeal. The Board heard no more from him and in the meantime he filed the present complaint.

B. The complainant says he filed his complaint directly with the Tribunal because of the inordinate delay in dealing with his appeal. He is challenging the implied rejection of his claim to the indemnity.

He submits that terminal remuneration is payable to him under Staff Rule 1050.4, and the Administration is wrong to refuse him such indemnity on the grounds of his misconduct because the charge of misconduct was never "defined".

Moreover, he objects to the Organization's arbitrary interpretation of the word "may" in Staff Rule 1075.1. Such a negative interpretation was unwarranted particularly as the decision to dismiss him was itself flawed – a matter that he had challenged in a previous complaint to the Tribunal and which had not yet been ruled on when he filed the present complaint. He submits that it is clear from the Tribunal's case law that the authority with the power of discretion should exercise it in good faith: in this instance the decision made by the Administration was *ultra vires*.

He seeks the quashing of the decision of 30 April 1997. He wants to be paid "terminal remuneration" as set out in Rule 1050.4. He also claims 5,000 United States dollars "towards cost and compensation for suffering mental and material injury". He adds that if there has meanwhile been a favourable outcome of his complaint concerning his dismissal he would only wish to press his claim for 5,000 dollars.

C. In its reply the Organization argues that the complaint is irreceivable under Article VII of the Tribunal's Statutes. In not waiting for the opinions of the regional and headquarters Boards he has not exhausted the internal means of redress that were open to him. Furthermore, both his internal appeal and his complaint to the Tribunal were filed out of time. As the Organization informed him in its letter of 30 April 1997, it was its letter to him of 31 July 1996 which contained the final decision regarding his termination and his internal appeal should have been filed within sixty days of receiving it.

On the merits, it rebuts the complainant's pleas that it made arbitrary use of a discretionary power in not paying him the indemnity he was seeking. Under the terms of Rule 1075.1 the granting of one month's notice was compulsory whereas the grant of the indemnity was discretionary. Because of the circumstances of his dismissal the Organization considered that payment of an indemnity was not justified. It rejects his claim to an award of damages.

D. In his rejoinder the complainant presses his pleas and maintains that his internal appeal was not filed out of time. The letter of 31 July 1996 did not mention non-payment of the terminal indemnity he is claiming and he therefore contests that he had sixty days from receipt of that letter in which to file his appeal.

He maintains that two of the letters produced by the Organization were "patently fabricated" and added to the records after he had filed his complaint in an attempt to "twist" the facts of his case. The reminders of 25 August and 15 September were supposedly sent to him by the Secretary of the regional Board of Appeal, but the complainant questions their authenticity. At the same time, his own reminders addressed to the regional Board on 24 September 1997, 3 February and 12 October 1998 were passed over in silence by the Organization and it has avoided any reference to the rejoinder he filed with the Board within the five-day time limit initially allowed. In the circumstances, he wishes the Organization to state if it received his letters of reminder. He also requests the Tribunal to grant additional appropriate relief because of the Organization's "misdemeanour".

He stresses that he also has a right to terminal indemnity under the terms of Staff Regulation 9.3 which states: "If the Director-General terminates an appointment the staff member shall be given notice and indemnity payment in accordance with the terms of his appointment".

E. In its surrejoinder the Organization points out that in Judgment 1856 the Tribunal rejected the complainant's plea that his dismissal was unlawful. There is therefore no foundation for the complainant's principal argument that the charge of misconduct was never made clear to him.

The WHO rejects the complainant's allegation that it fabricated evidence. Even if the complainant did file a rejoinder as he claims, the fact remains that the regional Board of Appeal did not receive it; that is clear since it sent reminders to him. Nothing prevented him from despatching it to the Board a second time.

The decision not to pay him the indemnity was taken for objective reasons and was free from personal prejudice. Moreover, it was not taken in breach of Regulation 9.3 which the complainant refers to. That Regulation provides that in the event of termination an indemnity is made in accordance with the terms of the staff member's appointment; but Staff Rule 1075.1, which is at issue in his case, also formed part of his terms of appointment, and so refusal of the indemnity was warranted.

CONSIDERATIONS

1. The complainant joined the Organization in New Delhi, in 1988. On 31 July 1996 he was dismissed with effect from 5 August 1996. By Judgment 1856 (*in re* Ochani No. 2) the Tribunal rejected his plea that his dismissal was unlawful.

2. On 16 April 1997 the complainant claimed a termination indemnity under Staff Rule 1075.1. This claim was rejected in a letter dated 30 April 1997 on the grounds that the grant of such indemnity was discretionary.

3. The complainant appealed to the regional Board of Appeal on 26 May 1997. The Organization says that he did not respond to a request made to him on 31 July 1997 to file a rejoinder, or to subsequent reminders.

4. On 29 October 1998 he filed an intention to appeal directly to the headquarters Board alleging that he had sent a rejoinder to the regional Board on 7 August 1997 but had received no response. On 4 November 1997 the Secretary of the headquarters Board told the complainant that information about his appeal was being sought and he would be contacted.

5. The complainant filed directly with the Tribunal on 26 December 1998, claiming inordinate delay. In a letter of 6 January 1999 the Secretary of the headquarters Board informed him that, in the absence of a response from the regional Board by 18 January 1999, the headquarters Board would take up the appeal. On 14 January 1999 the Secretary of the regional Board replied that the complainant had failed to submit a rejoinder despite reminders. The Secretary of the headquarters Board then wrote to the complainant on 20 January 1999 setting out the position. The complainant did not respond.

6. Quite apart from any argument concerning irreceivability it is clear that the complaint cannot succeed on the merits.

7. Staff Rule 1075.1 provides:

> "A staff member may be dismissed for misconduct as defined in Rule 110.8 and subject to the notification of charges and reply procedure required by Rule 1130. The staff member shall be given one month's notice. The Director-General may grant him an indemnity not exceeding one-half of that payable under Rule 1050.4. No end-of-service grant is payable."

8. The use of the word "may" shows that the Director-General has discretion as to whether a termination indemnity should be paid to a staff member who is dismissed for misconduct. The reason for dismissal was his attempt to defraud the Organization. Since the Tribunal ruled in Judgment 1856 that the Administration was justified in concluding that the complainant had acted improperly and therefore dismissed his complaint, it follows that the Director-General has lawfully exercised his discretion in not granting him an indemnity under Rule 1075.1. Since the complainant's case fails on the merits it is not necessary to rule on the issue of receivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

Mella Carroll

James K. Hugessen

Catherine Comtet

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

EIGHTY-NINTH SESSION

***In re* Ochani (No. 9)**

Judgment No. 1957

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr Parmanand Sachanand Ochani against the World Health Organization (WHO) on 18 January 1999, the WHO's reply of 26 April and the complainant's letter of 23 April 1999 informing the Registrar of the Tribunal that he did not wish to enter a rejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a former official of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. Under circumstances explained in Judgment 1856, delivered on 8 July 1999 on his second complaint, his service was terminated with effect from 5 August 1996. The decision to dismiss him was notified to him on 31 July 1996.

When the complainant entered the service of the Organization the year of his birth was recorded as 1937 on the basis of a school leaving certificate he provided. The complainant obtained a copy of his birth certificate on 1 May 1997 from the Indian High Commission in Islamabad, Pakistan. On

7 May the complainant wrote to the Regional Personnel Officer asking to have the year of his birth recorded as 1939 instead of 1937. In a letter of 13 May 1997 the Personnel Officer at SEARO refused his request on the grounds that his date of birth had been correctly established in line with documentation submitted when he began working at SEARO in 1988.

On 22 December 1998 he notified his intention to appeal to the headquarters Board of Appeal saying that he had appealed on 7 July 1997 to the regional Board but had received no reply. The Secretary of the headquarters Board wrote to the complainant on 6 January 1999 informing him that she was seeking information from the regional Board about the status of his appeal.

The Organization says that on 20 January 1999, two days after the filing of the present complaint, the Secretary wrote to the complainant again informing him that the regional Board had no record of his appeal and asked him to send another copy. She also told him that in the absence of a reply within fifteen working days the headquarters Board would assume that he did not wish to pursue the matter. He did not reply.

B. The complainant submits that since the WHO Manual and Staff Regulations and Rules are silent on the matter of determining a date of birth there can be no bar to his raising the matter. The WHO did not insist on his supplying a formal birth certificate when he entered its service which shows that there are no "hard and fast" rules about "recording or re-recording" a date of birth.

It was as a result of his difficult family circumstances that confusion had arisen as to the year of his birth. Following the political events of 1947 his family had to flee from Pakistan to India abandoning all they owned. Later in life he deduced that his year of birth was 1939 rather than 1937 and made efforts to procure a copy of his birth certificate.

He wants the Tribunal to direct the WHO to alter its records to show his date of birth as 28 September 1939, and allow him any benefits arising therefrom "in case the dismissal order dated 31 July ... is quashed" by the Tribunal. He also asks for "any other relief that the Tribunal may ... deem appropriate".

C. The Organization holds the view that the complaint is irreceivable under Article VII(1) of the Tribunal's Statute because the complainant has failed to exhaust the internal means of redress available to him. The regional Board did not receive his appeal, and, instead of checking to find out why he had not received a reply, he let seventeen months elapse before notifying his intention to appeal to the headquarters Board. His complaint is also irreceivable under Article VII(2) of the Statute as it was filed out of time.

As he first raised the matter with SEARO more than nine months after he was dismissed his complaint shows no present cause of action and he suffered no injury. The refusal to change his date of birth had no effect on his situation as he was dismissed before reaching the age of retirement.

On the merits, the Organization says that if the complainant had been in doubt as to the year of his birth he should have voiced his doubts at an earlier stage during his employment. He did not do so, and on his personal history form dated 1986 and an affidavit dated 30 June 1987 recorded his date of birth as 28 September 1937, the date that appears on his school leaving certificate.

CONSIDERATIONS

1. The complainant, who was dismissed from the Organization with effect from 5 August 1996, requested the Administration in a letter of 7 May 1997 to change his year of birth in the WHO's records from 1937 to 1939. This request was refused on 13 May 1997.

2. He claims to have filed an internal appeal with the regional Board of Appeal on 7 July 1997; however, the Board has no record of ever receiving it.

3. The complainant filed an appeal with the headquarters Board of Appeal on 22 December 1998 claiming "inordinate, inexcusable and inexplicable delay" on the part of the regional Board. The Secretary of the headquarters Board replied on 6 January 1999 saying that information about the status of his appeal was being sought from the regional Board. Having found out that no appeal had been received by it, the Secretary wrote to the

complainant on 20 January 1999 asking him for a copy of the appeal of 7 July 1997 with proof of posting. The complainant did not reply. He had, however, lodged a complaint with the Tribunal on 18 January 1999 on the grounds that the headquarters Board had failed to reply to his letter of 22 December 1998.

4. Quite apart from any argument concerning irreceivability that could be made concerning the complainant's failure to exhaust the means of internal redress, it is clear that the complainant would only have a cause of action if the decision to dismiss him, which formed the subject of Judgment 1856 (*in re* Ochani No. 2), had been quashed. Since that decision was upheld by the Tribunal, the application to change his date of birth is without purpose. The complainant was not adversely affected by the refusal and has suffered no injury: see Judgment 1220 (*in re* Kapoor No. 2).

5. The complaint is irreceivable on this ground and it is not necessary to consider any other ground of irreceivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-NINTH SESSION

***In re* Elsayed**

Judgment No. 1958

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Ibrahim Mohamed Khater Elsayed against the International Atomic Energy Agency (IAEA) on 27 August 1999, the IAEA's reply of 10 January 2000, the complainant's rejoinder of 3 March, and the Agency's surrejoinder of 20 April 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Egyptian national born in 1946, joined the IAEA in 1983 in the Division of Languages. He was initially engaged on a short-term contract and in due time he held longer, fixed-term contracts. At the time he filed his complaint he was the Supervisor of the Arabic Typing Unit and held grade G.6.

On 29 January 1998 his fixed-term appointment was extended for a period of three years – up to 28 February 2001. Upon signing the contract on 26 February he made reference to a letter he had sent to the Director of the Division of Personnel on 19 February in which he had asked for a five-year extension. On 8 April the Director informed the complainant that he was unable to accede to his request: the reason that the complainant had received only a three-year extension was unrelated to his work performance but was instead based on the fact that there was an ongoing review of the work in the Division of Languages. He was also informed that he might be considered for a five-year extension when his current contract expired.

On 30 November the complainant again wrote to the Director of Personnel asking that the length of his contract be reconsidered. The Director replied on 8 December 1998 reiterating what had been previously communicated to the complainant.

On 20 January 1999 the complainant appealed to the Director General against the decision not to reconsider him for a five-year contract extension. He also asked for "an award" for merit. On 12 March the Director General informed him that he considered the appeal to be time-barred. He added that recommendations for merit awards were made at divisional level. On that same day the complainant appealed against the decision to the Joint Appeals Board which determined that his appeal had not been lodged within the time-limit stipulated in Staff Rule 12.01.1(D). On 31 May 1999 the Director General informed the complainant that he was upholding the Board's opinion. That is the impugned decision.

B. The complainant contends that throughout his career with the IAEA he has been subjected to harassment and unfair treatment. On the issue of harassment, the complainant has provided numerous documents in support of his allegations that his subordinates in the Arabic Typing Unit and others working in the Arabic Section were encouraged by the former Director of the Division of Languages to act unprofessionally and display a lack of respect for the complainant's supervisory position. This has "seriously harmed [his] morale, career, normal life and social standing and also had a physical effect on [his] health leading to a breakdown in the office" which required the intervention of the Agency's Medical Service in 1996.

He also contends that this harassment has resulted in unfair treatment in the way his contract renewals have been handled. In 1988 he signed a three-year extension that was cancelled a few days later without explanation in favour of a two-year extension. In 1990 and 1991 he was given only one-year extensions in order for the new head of section to evaluate his performance. In 1992 his extension was for only two years, despite the fact that the head of section recommended five years. In 1994 he was given a three-year extension, again despite his section head's recommendation for a five-year one. Then on 29 January 1998, one month before his contract was to expire, he was offered only a three-year extension, which he argues was in breach of the Staff Rules and "did not follow the normal pattern". He also says that he was discriminated against over a ten-year period.

He seeks compensation for damage to his morale, social standing and health as well as for "damage to career (promotion)". He also seeks the "security of [his] post" and a five-year extension when his contract is next renewed, or "amendment of the current contract to five years".

C. In its reply the Agency objects to the receivability of the complaint. It submits that it is time-barred as the complainant did not challenge the Director of Personnel's decision of 8 April 1998 within the requisite time limit.

The defendant asserts that the complainant's allegations of long-standing discrimination should not be entertained. Instead of substantiating his allegations he merely refers to numerous documents which for the most part are internal and confidential Agency documents. It says that at no point over the last ten years has the complainant challenged any decision in connection with what he terms "discrimination".

It argues that the three-year renewal was in line with a policy that was applied to all staff members in the complainant's Division and that this represented the most favourable length of extension possible at that time.

D. In his rejoinder the complainant contests that his complaint is time-barred. He accepted in good faith that as there was on-going verbal communication, it meant that the subject of extending the length of his contract to five years was still under consideration. He points out that in his letter of 30 November 1998 he had reminded the Director of Personnel of a conversation they had had on 28 September. During that conversation the Director had told him that the matter of his contract was being looked into and that details had been forwarded to the relevant person. Therefore, it was the Director of Personnel's reply of 8 December that constituted a decision against which he could appeal to the Director General, and he did so in a timely manner.

He reiterates that his colleagues were encouraged by his supervisors to treat him without respect, which hindered the quality of the work in the Typing Unit that he supervised.

E. In its surrejoinder the IAEA contends that there is no evidence to support the complainant's claim that he has been discriminated against by his colleagues and supervisors. The only issue in this case is his request for a five-year contract extension, which is time-barred and also unfounded.

CONSIDERATIONS

1. The complainant has been a member of the staff of the IAEA since 1983. He has held a series of short-term and fixed-term contracts, none of a duration longer than three years. In January 1998 he was offered a three-year extension to his contract which was due to expire on 28 February 1998. Before accepting this offer, he wrote on 19 February 1998 to the Director of the Division of Personnel to complain that he had not been offered a five-year extension. He stated that he had been treated unfairly and referred to "long-lasting suffering" in the course of his employment with the Agency. The Director of Personnel responded in writing on 8 April stating that he was unable to alter the three-year extension to the complainant's fixed-term contract.

2. On 30 November the complainant wrote again to the Director of Personnel requesting reconsideration of his case. That request was refused by a written communication dated 8 December 1998.

3. The complainant appealed to the Director General in a letter dated 20 January 1999. In that letter he sets out in detail a series of grievances and instances of alleged mistreatment extending over a period of many years and resulting in his being "victimized" by the granting of contract extensions which were shorter than normal. He refers in particular to the most recent three-year extension. The two concluding paragraphs of the letter read as follows:

> "In view of the above facts, I appeal to you to reconsider the administrative decision taken in my case and to rectify the extension period of my contract to five years, which I would normally have been awarded seven years ago.
>
> I would also greatly appreciate it if you would agree to grant me an award [for merit], which I feel would be a great morale boost, and acknowledgement of my good deeds since I started working with the Agency."

4. In a letter dated 12 March 1999 the Director General, while stating that he considered the complainant's request to be time-barred, went on to reject it on the merits. The complainant's request for a merit award was also refused. An appeal to the Joint Appeals Board was unsuccessful and the Director General confirmed the decision by a letter dated 31 May 1999. That is the impugned decision.

5. In his complaint to the Tribunal the complainant asserts two alleged grounds of complaint, the first being harassment over many years of his employment with the Agency and the second being the refusal to extend his contract for the five-year period to which he considers that he was entitled.

6. The claim to compensation for harassment is clearly irreceivable on the grounds that the complainant has failed to exhaust his internal means of recourse. It appears for the first time as a separate cause of action in the complaint to the Tribunal. While the facts alleged to constitute harassment do, for the most part, appear in the appeal to the Director General, they do so only as supporting material for the complainant's claim to a longer extension of his contract. They could be relevant to that claim since the decision to renew for a shorter term, like the decision to renew or not renew, is discretionary and may only be reviewed on limited grounds: see Judgment 1617 (*in re* Lebtahi). But, as appears from the quoted paragraphs of his letter of appeal, he did not claim any specific remedy in that regard.

7. As regards the claim to a longer contract extension, the Agency is clearly right in its view that the appellant's recourse to the internal appeals procedure was time-barred. The relevant Staff Rule, 12.01.1(D), provides that appeal to the Director General against an administrative decision must be submitted within two months from the date of communicating such a decision in writing to the staff member. In the present case, the decision of

the Director of Personnel was dated 8 April 1998 and he appealed to the Director General only on 20 January 1999. Clearly, the complainant's request to the Director of Personnel on 30 November 1998 to reconsider the earlier decision could not have the effect of reviving a right of appeal which by that time had long since expired. Likewise, the complainant's assertion (unsupported by any evidence other than a self-serving statement in the letter of 30 November 1998) to the effect that the Director of Personnel had verbally agreed to look into the matter in September 1998 is of no avail; such an undertaking, even assuming that it was given, is far from amounting to a renunciation of a prescription already acquired.

8. The complainant having failed to exhaust his internal means of redress, the complaint is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Aarsman and others**

Judgment No. 1959

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr Johannes Aarsman, Mrs Meabh Mary Allen, Miss Karin Birgitta Andersson, Mr Philip James Bradbury, Mr Jeremy John Collins, Mrs Jane Elizabeth Cook, Mr Fabrice Olivier Marius Drogoul – his second – Mr Stéphane Gouraud, Mrs Marie-Thérèse Guerin, Mr Gabor Hajdufi, Mr Benoît Houot, Mr Zoltán Péter Kozma, Mr Philippe Ledru, Mr Paul Francis Lynch, Mr Tommy Mallet, Mr Miguel Angel Muñoz, Mr James Richard Parry, Mr Neale Pickerell, Mr Dominic Neville Pinson, Miss Anja Elisabeth Schott, Mr George Graham Scott, Miss Tiina Marianne Seppälä, Mr Peter Gerald Tatchell, Miss Beatriz Valverde Asensio, Mr Willem van Leeuwen and Miss Eva Zenteg against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 24 July 1999, Eurocontrol's reply of 22 October, the complainants' rejoinder of 20 December 1999 and the Agency's surrejoinder of 25 February 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Considering the applications to intervene filed by Mr Marc Durasse and Mr Tome Saiote;

Considering that the Agency did not wish to submit observations on these applications;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The background to the case and the qualifying conditions for the fixed allowance known as the "typing allowance" for grade C employees of the Agency are described in Judgments 1403 (*in re* Tejera Hernandez), 1411 (*in re* Bidaud), 1461 (*in re* Borrello and Chant), 1601 (*in re* Aelvoet No. 5 and others) and 1712 (*in re* Aelvoet No. 6 and others).

Article 4a of Rule of Application No. 7 of Eurocontrol's Staff Regulations provides, in part, that:

> "An official in category C employed as copy typist, shorthand typist, telex operator, varitypist, executive secretary or principal secretary may be paid a fixed allowance."

Until 1995, this allowance could also be granted, by analogy, to grade C employees who were "clerical officers" and who spent at least 60 per cent of their time using typewriters or 50 per cent of their time using a computer keyboard.

By office notice 19/95 of 22 December 1995, the Director General repealed Article 4a of Rule of Application No. 7. By office notice 8/98 of 14 May 1998, he re-established the provision with retroactive effect as from 1 January 1996 in order to give effect to Judgment 1712. He indicated that employees who had entered the service of the Agency since 1 January 1996 would benefit from the application of this provision by analogy from the date on which they met the qualifying conditions but that, from the date of publication of office notice 8/98, Article 4a of Rule No. 7 would be applied *stricto sensu* and the practice of awarding the allowance by analogy would be brought to an end, except for employees who met the qualifying conditions prior to the date of publication of the notice.

The complainants are, or have been, employees of Eurocontrol working as clerical officers or as operators. Between March and June 1998, they applied to the Director General for the fixed typing allowance. Their applications were rejected either explicitly by letters of 14 September 1998 or implicitly. The complainants appealed against these decisions. In its report dated 10 February 1999, the Joint Committee for Disputes recommended that the Director General grant their claims as they met the criteria of the time worked on a typewriter or computer keyboard which had been recalled by the Tribunal in Judgments 1403 and 1461. In letters of 27 April 1999, the Director General rejected the internal complaints on the grounds that, based on constant practice, the allowance had been awarded by analogy only to clerical officers assigned to jobs of an administrative nature, which was not the case of the complainants, who were assigned to operational, technical or computer-related work. Those are the impugned decisions.

B. The complainants plead breach of the rule *patere legem quam ipse fecisti* and contend that they met the "objective criteria" specified by the Tribunal in Judgment 1403 for the award of the allowance by analogy. They submit that the Tribunal has already dismissed the plea that only employees carrying out secretarial or typing functions may be awarded the allowance. They argue that the Agency, by retroactively modifying a recognised practice, is acting unlawfully. In their view, the impugned decisions constitute discrimination between employees on the basis of the service to which they are assigned.

The complainants seek the quashing of the impugned decisions; the payment of the typing allowance, plus 10 per cent interest a year as from 1 January 1995, the date when they say it was no longer possible to apply for the allowance which was being abolished by the Agency, or the date of their entry into its service, whichever is later; and 10,000 French francs for each complainant in moral damages and costs.

C. In its reply Eurocontrol contends that the case law of the Tribunal leaves open the possibility to add criteria to the granting by analogy of the typing allowance. There is a constant practice of not awarding the allowance to employees who, such as the complainants, discharge technical or operational functions. These are clear and objective criteria which were known to the staff, since several complainants entered the service of the Agency at a time when the allowance was commonly awarded. However, they had not applied for the allowance or had already been refused it. Moreover, in accordance with office notice 8/98, the allowance could not be awarded prior to 1 January 1996. The Agency denies that the impugned decisions are in any way retroactive. It also denies any discrimination, since the complainants are in a specific factual situation justifying different treatment. It calls for the complainants to be ordered to pay the full costs and, subsidiarily, opposes the award of moral damages and interest, since it maintains that it acted in good faith.

D. The complainants rejoin that the restrictions on the granting of the allowance date from before 1 January 1996 and they seek the award of the fixed allowance as from 7 April 1994, or the date of their entry into the Agency's service, whichever is later. They cast doubt on Eurocontrol's good faith and press their claims for damages and interest.

E. In its surrejoinder the Agency observes that the restrictions prior to 1 January 1996 had been suspended and that Article 4a of Rule No. 7 remained in force until it was repealed in office notice 19/95 of 22 December 1995. It submits that a practice based on objective criteria cannot be qualified as discriminatory and denies bad faith.

CONSIDERATIONS

1. The complainants, all employees or former employees of Eurocontrol, worked or have worked as clerical officers or operators.

Considering that they met the qualifying conditions for the fixed allowance known as the "typing allowance" provided for in Article 4a of Rule of Application No. 7 of Eurocontrol's Staff Regulations, they applied for the grant of the allowance.

They appealed against the explicit rejection, or what they consider to have been an implicit rejection, of their applications by the Administration. In its report of 10 February 1999 the Joint Committee for Disputes unanimously concluded that the complainants met the formal qualifying conditions for the fixed allowance.

Disregarding the opinion of the Committee, the Director General dismissed all the internal complaints in decisions dated 27 April 1999, which are challenged in the present complaints.

2. Since the complaints raise the same issues of fact and law and seek the same redress, they are therefore joined to form the subject of a single judgment.

3. The complainants request the Tribunal to (1) set aside the decisions of the Director General of 27 April 1999; (2) order the payment of the typing allowance from 1 January 1995 or from the date of their entry into the service of Eurocontrol, whichever is later; (3) order the payment of interest at the rate of 10 per cent per annum from that date until the payment of the allowance; (4) order the payment of 10,000 French francs in moral damages to each complainant; and (5) order the reimbursement of their costs.

In support of their complaints, they have three pleas: breach of the rule *patere legem quam ipse fecisti*; the unlawfulness of the retroactivity of the Agency's decision; and discrimination between employees.

4. In its reply Eurocontrol objects to the receivability of the complaints filed by Mrs Allen, Mr Lynch and Mr Mallet for failure to exhaust the internal remedies. These complainants have subsequently withdrawn suit and, in its surrejoinder, Eurocontrol requests the Tribunal to record this.

5. The issue of granting the typing allowance to officials in category C provided for by Article 4a of Rule of Application No. 7, quoted under A above, has already been referred to the Tribunal. It found in Judgment 1403 that Eurocontrol had granted the allowance by analogy to clerical officers on their application, by taking each case on its merits, whenever they spent at least 60 per cent of their time using typewriters or 50 per cent of their time using a computer keyboard. The Tribunal inferred that Eurocontrol had placed a certain construction on Article 4a of Rule No. 7 in good faith and that its obvious intention was thereby to assume an obligation, since any clerical officer on its staff who met the requisite criteria and applied for the allowance might be granted it.

6. In support of its refusal to grant the typing allowance to the complainants, Eurocontrol says that there exists a constant practice, based

on objective criteria known to the staff, not to grant the allowance to employees working as Flight Data Operators (FDO) or to clerical officers discharging technical or operational functions. It adds that these criteria were applied in good faith.

7. The Tribunal recalls that in a similar case, which gave rise to Judgment 1461, it found that "none of the criteria Eurocontrol applied in earlier cases required that clerical staff claiming the grant should be performing tasks akin, either mostly or incidentally, to those of a secretary or typist".

In the present case it may be added that, notwithstanding Eurocontrol's arguments, none of the criteria applied earlier contrasted administrative support duties with functions of a technical and/or operational nature.

8. Consequently, by dismissing the complainants' internal complaints on the grounds that, because they were not discharging secretarial or administrative support tasks they were not entitled to the fixed allowance, Eurocontrol breached the rule which it had itself imposed when setting the objective qualifying criteria for the fixed allowance. It also acted in a discriminatory manner towards the complainants.

The impugned decisions must therefore be set aside and the fixed allowance granted to the complainants from the date on which they made their respective applications, in the case of those who have entered the service of the Agency since 1 January 1996 – date on which Article 4a of Rule No. 7 was re-established – and as from 1 January 1996, in the case of those who were in its service before that date.

9. For the reasons set out in Judgment 1461 under 7, to which reference is made, the complainants are entitled to interest on the arrears. However, in view of the circumstances, the Tribunal does not find it necessary to grant compensation for the moral damages which the complainants say they suffered.

10. Their plea succeeds and the complainants are entitled to costs.

DECISION

For the above reasons,

1. The withdrawal of suit by Mrs Allen, Mr Lynch and Mr Mallet is recorded.
2. The decisions of the Director General of 27 April 1999 are set aside.
3. Eurocontrol shall pay the fixed allowance known as the "typing allowance" to the complainants as set out under 8 above, as well as interest on the arrears at the rate of 8 per cent per annum.
4. It shall pay the total sum of 20,000 French francs in costs.
5. The applications to intervene are upheld provided that the interveners are in the same situation of law and of fact as the complainants.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

***In re* Yoshida** **Judgment No. 1960**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Tokuo Yoshida against the World Health Organization (WHO) on 15 June 1999, the WHO's reply of 15 September, the complainant's rejoinder of 18 October 1999, and the Organization's surrejoinder of 14 January 2000;

Considering Article II, paragraph 5 of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Japanese national born in 1943, holds a P.5 post at the WHO. At the material time he was Chief of the Regulatory Control Unit (RCU) under the Programme on Substance Abuse (PSA), which came under the Division of Mental Health and Prevention of Substance Abuse (MSA). The RCU was involved in recommending whether certain pharmaceuticals should be classified as addictive.

In July 1995 the Management Development Committee (MDC) was asked to evaluate how the Organization could cut costs. One of its recommendations was to "regroup" the RCU under the Division of Drug Management and Policies (DMP). Although this recommendation was endorsed by the Director-General on 24 July 1995, it was not immediately implemented.

In October 1997 the complainant sent three faxes to his technical counterparts outside the WHO. Two of these faxes were sent to donor pharmaceutical companies and the third was sent to a non-governmental organisation "in official relations with WHO". In these faxes he raised the issue of possible impropriety insofar as these pharmaceutical companies also fund programmes in the same Division of the WHO which oversees the Unit on drug regulatory control of products produced by those companies. The faxes were on WHO letterhead, signed by the complainant in his official capacity and were sent without the knowledge or approval of his supervisors. He also wrote to the Director of the Division of Budget and Finance, questioning the acceptability of such contributions from pharmaceutical companies.

On 31 October 1997 an information circular announced the "regrouping" of RCU under DMP.

On 18 February 1998 the Assistant Director-General in charge of activities concerning drug management and policies informed the complainant of the possibility that disciplinary action could be taken against him as a result of the communications he had sent, and asked him to provide a written explanation. The complainant responded on 23 February that "the overall objective of [his] communications ... was to expedite the implementation of the MDC recommendation concerning the regrouping of [his] unit" and that he also wanted to "protect the good name of WHO as a reliable institution within the UN drug control system". On 30 April the Assistant Director-General issued him a written reprimand for violating the conduct outlined in Article 1 of the Staff Regulations and Staff Rule 110.

On 17 August the complainant appealed against the written reprimand to the headquarters Board of Appeal. In its report of 13 December 1998 the Board of Appeal, finding that the complainant had acted in good faith and had not violated any staff rules or regulations, recommended the reprimand be withdrawn. On 26 March 1999 the Director-General upheld the reprimand on the grounds that the complainant had sent the communications without the prior knowledge or approval of his Director and that staff members have an obligation to uphold the Organization's policy, regardless of personal views. That is the impugned decision.

B. The complainant disputes the written reprimand on the grounds of incomplete consideration of the facts. First, he submits that in rejecting the recommendation of the Board of Appeal the Director-General has disregarded its findings and has merely restated the allegations of the Administration. He argues that sending the three faxes without seeking the approval of his Director did not violate any staff rules since the faxes were nothing more than correspondence with his technical counterparts "on matters within his area of responsibility".

Secondly, he contends that the Organization's failure to apply its own "policy" and "decision" led to an apparent conflict of interest. He considers that the immediate implementation of the management decision of 24 July 1995 to "regroup" his Unit under DMP would have prevented any appearance of impropriety. The Director of the Division overseeing his Unit was permitted to solicit contributions from pharmaceutical companies for other WHO programmes. Therefore, he argues, the transfer of his Unit would have resulted in removing that Director from the decision-making process concerning the international classification of addictive drugs manufactured by those same companies, thereby avoiding any appearance of a conflict of interest. He contends that allowing the Director to block the transfer of the RCU for more than two years is just one example of the "special treatment" he was granted.

The complainant asserts that the reasons given in the Director-General's letter of 26 March 1999 upholding his reprimand are without merit, particularly since a policy regarding donations from private enterprise did not exist at the time he sent the faxes. He acted on the basis of a memorandum of 15 October 1990 from the WHO Legal Counsel which advised him and his immediate supervisor to avoid even an "appearance" of a conflict of interest when dealing with pharmaceutical companies.

He asks that the decision refusing that the reprimand be removed from his personnel file be set aside.

C. In its reply the Organization argues that the communications sent by the complainant "implied improper action on the part of WHO in accepting the contributions, and on the part of the contributors in having made the donations". Furthermore, it would not have been unreasonable for anyone who read the faxes to conclude that the funds should not have been donated.

In issuing the written reprimand it properly exercised its discretionary authority and complied with the Organization's Staff Regulations and Rules. As a senior WHO official with many years of experience, the complainant knew that it was improper to send these faxes without clearance. His action violated the administrative procedures of PSA which requires that "correspondence with financial implications ... be cleared by the Director PSA". The complainant sent the faxes in order to put pressure on the Organization to hasten the internal reorganisation which had been envisaged since 1995.

His reliance on the 15 October 1990 memorandum was flawed; that memo addressed a different set of facts than those at issue here. It denies that the Director was granted any special treatment which allowed him to block the transfer of the Unit.

D. In his rejoinder the complainant contends that his actions protected the reputation of the WHO. He refutes the Organization's argument that the faxes could be construed as damaging to the WHO's reputation since they were sent to only three people, who were collaborating partners of the WHO with a vested interest. Given the fact that the faxes were sent to such partners, they represented an "internal" solution to the problem of the perception of a conflict of interest. It was not necessary to clear the faxes with his Director because they did not financially obligate the WHO in any way.

E. In its surrejoinder the Organization notes that the complainant does not dispute the material facts and maintains that by sending the faxes he breached the duty of loyalty and discretion owed to the WHO. It points to the Tribunal's case law to refute the complainant's arguments, reiterating that the complainant's actions merited disciplinary action. His actions had less to do with protecting the best interests of the Organization than with trying to expedite an internal reorganisation. In addition, it is for the WHO, and not the complainant, to decide what is in its best interests.

CONSIDERATIONS

1. The complainant contests a written reprimand which was issued to him by an Assistant Director-General of the WHO on 30 April 1998. The complainant appealed the reprimand to the headquarters Board of Appeal which, in a report dated 13 December 1998, recommended the withdrawal of the reprimand. The Director-General rejected that advice and on 26 March 1999 upheld the written reprimand. That is the impugned decision.

2. The complainant was reprimanded for sending facsimile communications on official letterhead to two employees of large pharmaceutical firms and one employee of a non-governmental organisation. In those communications, the complainant expressed concern about the propriety of certain contributions made by them to the WHO. These communications had not been authorised by the complainant's supervisor and did not represent WHO policy.

3. The complainant submits that his actions did not contravene any WHO policy regarding the acceptability of funding from private enterprises but rather that he was giving effect to a policy for which there was precedent in the Organization's own practice. In this latter respect, the complainant refers to an incident in 1990 when he had expressed concern over a contribution made by a pharmaceutical company to support activities in the study of the rational use of psychoactive drugs. On that occasion, the Organization's legal advisor had agreed with the complainant and had stated in a memorandum that: "the receipt of financial contributions from the pharmaceutical industry for the Organization's work in psychoactive drugs creates an unacceptable conflict of interest ... For this reason, such offers of contributions have to date been declined".

4. In the complainant's view, the situation on which he was commenting in October 1997 was similar to that which had existed in October 1990. He further believes that if a planned regrouping of his unit – the Regulatory Control Unit into the Division of Drug Management and Policies – had in fact been carried out as had been mooted in 1995, the appearance of a conflict of interest in respect to the donations in question could have been avoided. He alleges that the failure to carry out the regrouping in a timely manner was due to "special treatment" granted to the Director of the MSA who, he alleges, had engaged in illegal activities.

5. Finally, the complainant claims that the Director-General, in her decision, did not adequately explain how and why she had rejected the recommendations of the headquarters Board of Appeal.

6. The complainant is wrong. In the first place, it is not the complainant's role to decide whether or not the situation which he thought he observed in 1997 was identical to that which had been adjudged a conflict of interest in 1990. Indeed it is clear that the complainant understood the proper course to follow when he perceived a possible conflict situation, for he had in fact followed it in 1990 when he had written a memorandum which had found its way to the legal department which had, in due course, issued its opinion. Secondly, whether or not there was a conflict in 1997, it was not the complainant's role to write to potential contributors with respect thereto; the administrative procedures manual of the PSA is specific in requiring that: "Correspondence relating to contributions or potential contributions to PSA" should be signed by the Director of PSA. The complainant's intemperate action was in breach of this provision. Thus even if the complainant was acting in good faith and in what he perceived to be the best interests of the Organization, as was found by the Board of Appeal, that does not minimise the nature of his misconduct. Given that the complainant wrote without authorisation on official letterhead to financial contributors to the Organization, thereby possibly endangering relations with and funding from such donors, it is impossible for the Tribunal to say that the relatively mild sanction imposed, that of a written reprimand, was disproportionate.

7. The complainant's attempt to link his actions with the Organization's alleged failure to carry out the regrouping of the RCU into the DMP is simply irrelevant as are his slanderous and unproven allegations against the Director of MSA.

8. Finally, the complainant's allegations that the Director-General failed to give reasons for rejecting the Board of Appeal's recommendation is without foundation.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

EIGHTY-NINTH SESSION

***In re* Cody** **Judgment No. 1961**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr John Richard Cody against the United Nations Industrial Development Organization (UNIDO) on 23 March 1999 and corrected on 10 May, UNIDO's reply of 9 September, the complainant's rejoinder of 27 October 1999 and the Organization's surrejoinder of 2 February 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a United States citizen born in 1942, was employed as an economist with UNIDO as from 31 July 1973. At the time of his separation from UNIDO he had a permanent appointment at grade P.4.

In 1995 UNIDO introduced a two-phase staff reduction exercise. A joint body called the Advisory Group on Human Resource Planning was established in August 1995 for the purpose of making recommendations to the Director-General for the retention or separation of staff members. The first phase announced by the Director-General on 20 November 1995 consisted of a voluntary separation programme for which the deadline to apply was 8 January 1996. The second phase, announced on 16 January 1996 by the Director-General, involved non-voluntary measures. By a memorandum of 23 February 1996 the Managing Director of the Country Programmes and Funds Mobilization Division informed the complainant that his post would be abolished and a recommendation would be made by the Advisory Group as to whether he would be separated from service or retained.

On 8 March the complainant wrote to the Chairperson of the Advisory Group setting forth reasons for his being retained. Among other things he mentioned that after twenty-three years of service with UNIDO, he was only two years away from early retirement with full pension and that termination at his age without this possibility would cause him considerable financial hardship. On 20 May the Chairperson informed him that the Advisory Group had studied his case and had been unable to identify a suitable post; it would therefore recommend to the Director-General that the complainant's appointment be terminated as from 21 June 1996. The complainant replied to the Advisory Group on 31 May, identifying a range of possibilities for his retention. On 19 June the Director of Personnel Services notified the complainant that his permanent appointment would be terminated on 28 June 1996 in accordance with Staff Regulation 10.3(a). He would receive, inter alia, three months salary in lieu of notice.

On 24 June the complainant requested to be put on special leave without pay from 28 June 1996 until 31 July 1998, at which point he would have contributed to the United Nations Joint Staff Pension Fund for twenty-five years. On 2 July 1996 the Chief of the Personnel Administration and Social Security Section informed the complainant that his request had been granted.

On 14 August the complainant requested the Director-General to review the decision to terminate his appointment and to consider him for two posts. On behalf of the Director-General the Director of Personnel Services wrote to him on 8 October 1996 saying that the decision to terminate his appointment was upheld.

On 9 December 1996 the complainant appealed to the Joint Appeals Board against the decision of 8 October 1996. On 8 December 1998 the Board recommended that the Director-General reverse the decision to terminate the complainant's contract and reinstate him; if reinstatement was not possible it recommended that "a mutually acceptable agreement leading to an alternative settlement should be negotiated with the [complainant]". The Director-General accepted this recommendation on 7 January 1999 but since that time the complainant and UNIDO have been unable to agree upon a settlement; therefore, the complainant has filed this complaint with the Tribunal.

B. The complainant puts forward two pleas. First, his post was not actually abolished; all his duties were given over to another staff member. He argues that "unlike many others" he was not informed that his post was targeted for abolition until after the deadline for voluntary separation had expired. In addition, he would still be with the Organization if he had not been transferred to a new post in 1994 without notification and for which he lacked certain qualifications. Secondly, he contends that the Advisory Group disregarded his rights under Staff Rule 110.02(a) by making little effort to identify a suitable post for him. He was interviewed for only two posts – one for which he clearly lacked the requisite language skills – although he had suggested many available posts for which he was qualified.

Relying on the findings and recommendations contained in the Joint Appeals Board's report the complainant asks that the decisions of 19 June 1996 and 7 January 1999 be set aside and that he be reinstated with back pay and benefits. If reinstatement is not possible, he asks for payment by UNIDO of arrears of pay and benefits from his date of dismissal until 31 July 1998, the date on which he would have reached twenty-five years of service, including the restoration of payments made by the complainant to the pension fund and for his children's schooling; the inclusion, in the pension fund, of rights for a dependent child born during the period in question; and restored participation in the Van Breda insurance scheme for pensioners. He also asks for moral damages and costs.

C. In its reply the Organization refutes the allegation that the complainant was not given adequate information regarding the voluntary separation programme. The bulletins of the Director-General on both the voluntary and involuntary programmes indicated the procedures for each one. It was specified that the posts to be abolished would not be identified until the end of January 1996, which was after the voluntary programme would have ended. In addition, the Director-General's Bulletin of 20 November 1995 clearly stated that "staff members aged 54 and above are being specifically addressed to consider the possibility of early retirement". The complainant could have applied for the voluntary programme but failed to do so. It also denies that it disregarded the complainant's rights under Staff Rule 110.02(a). He was considered for available posts in UNIDO but was not found suitable.

Based on the above, UNIDO contends that the complainant is not entitled to moral damages and costs. It also points out that it was because of the complainant that the mutual settlement was not reached.

D. In his rejoinder the complainant presses his argument that the Organization and the Advisory Board did not take adequate steps to find a suitable post for him. He reiterates that one of the only two posts identified had a language requirement that he obviously could not satisfy. In addition, there was a lack of understanding about his experience and expertise.

E. In its surrejoinder UNIDO again denies the accusation that it did not take adequate action before terminating the complainant's appointment. The recommendations made following interviews with him indicated that he was not the candidate best suited for the posts in question; having no other alternative the Organization had to terminate his appointment.

CONSIDERATIONS

1. On 19 June 1996, as a part of its general staff reduction brought about by budgetary constraints, UNIDO decided to terminate the complainant's permanent appointment with effect from 28 June 1996. His internal appeal was heard by the Joint Appeals Board which recommended on 8 December 1998 that the decision be reversed and that he be reinstated but that, should reinstatement not be possible, a mutually acceptable agreement be reached with him. By a decision of 7 January 1999, the Director-General maintained the original decision to terminate the complainant's appointment and directed that efforts be made to find a

mutually acceptable settlement. Efforts to reach such a settlement having failed, the complainant impugns the decision of 7 January 1999.

2. The complainant seeks the reversal of the impugned decision, reinstatement with full pay and benefits to at least 31 July 1998, the date at which he would have been entitled to take early retirement with full pension, moral damages and costs.

3. The complainant alleges that the decision to terminate his appointment was in breach of Staff Regulation 10.3(a) and of Staff Rule 110.02(a), the relevant texts of which read as follows:

> "Regulation 10.3(a):
>
> The Director-General may terminate the appointment of a staff member who holds a permanent appointment if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or, if the staff member is, for reason of health, incapacitated for further service."
>
> "Rule 110.02(a):
>
> If the necessities of the service require abolition of a post or reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on fixed-term appointments, provided that due regard shall be paid in all cases to relative competence, to integrity and to length of service ..."

4. The complainant's principal arguments are that the post which he occupied at the time his appointment was terminated was never in fact abolished and that no proper efforts were made to redeploy him in accordance with the priority to which his permanent appointment entitled him under the terms of Rule 110.02(a) cited above. He also argues that the Administration acted unfairly in terminating him after twenty-three years of service and with two years to go before he became eligible for early retirement with full pension. He also contends that he should have been warned that his position might have been in danger prior to the decision being made to abolish it so that he would have been able to take advantage of the voluntary separation programme.

5. The complainant's argument that his position was not really abolished, which found favour with the Joint Appeals Board, is based upon

his assertion that most or all of his former duties were assigned to another staff member. This argument confuses the abolition of a post with the disappearance of the duties attached to that post. In Judgment 139 (*in re* Chouinard), the Tribunal made it clear that it did not consider the assignment of the duties of an abolished post to other staff members as an indication that there had been an abuse of authority, provided that the evidence showed that the number of staff members was in fact reduced. That is the case here and it is clear from the evidence that the number of staff employed by UNIDO was substantially reduced at the time the complainant's position was abolished.

6. As regards the complainant's argument that he was not granted the priority to which he was entitled in the efforts to redeploy him, the evidence shows that the complainant was considered for a number of available positions in UNIDO but was not found to be suitable for any of them. The complainant takes issue with the opinions expressed by various persons by whom he was interviewed for such positions, but these are essentially matters of personal judgment with which, in the absence of evidence of fraud or improper motive, the Tribunal will not interfere.

7. The complainant's contention that he should have been warned of the possible abolition of his post in time to allow him to take advantage of the voluntary separation programme is equally without merit. The deadline for applying for voluntary separation was 8 January 1996 and it is clear that this was established precisely for the purpose of allowing the employer, who was facing drastic budget cuts, to know how many members of the staff would be leaving voluntarily before it had to undertake involuntary terminations and identify the posts which would have to be abolished. It would in fact have been impossible to tell the complainant, prior to that date, that his post was likely to be abolished.

8. The complainant can draw no comfort from Tribunal decisions – for example Judgments 1772 (*in re* Tueni) and 1782 (*in re* Zaunbauer) – in which other former staff members of the Organization were successful in showing that their rights under Staff Rule 110.02(a) had not been respected. Each case is dependent on its own facts as established by the evidence

presented. The fact that an Organization may have failed in its duty to some staff members is not evidence that it has done so in respect of others. The complainant has not shown that he was not fully and fairly considered for all the available posts prior to being terminated.

9. The complainant's case is undoubtedly a sympathetic one and was viewed as such by the Organization. He served it long and faithfully and was released with a scant two years to go before he would have been entitled to take early retirement with full pension. Following the impugned decision of 7 January 1999 and in accordance with the terms thereof, the Organization made an offer to the complainant in terms which would have allowed him to take early retirement with full pension and other benefits on 31 July 1998 and with reimbursement of his contributions to the pension fund which he had paid out of his own pocket during the period of special leave without pay from June 1996 to July 1998. Although that offer had a limitation date on it which has now expired, the Tribunal hopes, without imposing any obligation, that the Organization will still make it available to the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-NINTH SESSION

***In re* Martinuzzi** **Judgment No. 1962**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Livio Martinuzzi against the European Patent Organisation (EPO) on 26 February 1999 and corrected on 12 April, the EPO's reply of 27 July, the complainant's rejoinder of 2 September, and the Organisation's surrejoinder of 23 September 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out under A in Judgment 1864, *in re* Andrews and others. The complainant, an Italian national born in 1948, is a permanent employee of the EPO. Like the complainants in Judgment 1864, he resided in the country of his duty station for more than three years before commencing employment with the EPO.

The complainant filed an internal appeal on 26 October 1998 requesting payment of the expatriation allowance under Article 72 of the Service Regulations for Permanent Employees. On 1 December the appeal was rejected on the same grounds as the internal appeals which led to Judgment 1864. That is the impugned decision.

B. The complainant alleges that by withholding the expatriation allowance the EPO discriminated against him. It arbitrarily created two categories of expatriate staff for no objective reason, since Article 72(1) b) is not a valid criterion for granting or withholding the allowance. It was thus in breach of the principle of equal treatment, a principle recognised in the Tribunal's case law and a number of international texts including the Universal Declaration of Human Rights.

He contends that the system established in Article 72 is inconsistent and open to abuse: for example, someone who was granted the allowance on recruitment may keep it even after the "disqualifying period" has been completed. The rule is therefore "superficial and arbitrary".

The complainant asks the Tribunal to quash the decision of 1 December 1998 and to order the EPO to pay him the allowance retroactively to his date of appointment or, failing that, to 1 July 1990 or to 23 September 1992 or to the date of his complaint.

C. In its reply the Organisation argues that the present complaint and pleas submitted by the complainant's counsel are "verbatim repetitions" of the complaints and rejoinder submitted in the cases which led to Judgment 1864. Following the Tribunal's decision in that judgment, to dismiss the complaints, the EPO invited the complainant to withdraw his complaint; he chose not to do so. The defendant asks the Tribunal to find that the present complaint is an "abuse of procedure" and order the complainant to pay the costs incurred.

Subsidiarily, considering that the complainant has not made any specific additions to the brief submitted in the above-mentioned complaints before filing it as his own, the EPO asks the Tribunal to refer to the statement of facts and the arguments it put forth in Judgment 1864; it argues that the complaint is irreceivable in part and unfounded.

D. In his rejoinder the complainant withdraws the complaint as to its merits. However, he argues that the counterclaim for costs is defective as the Organisation has neither specified an amount nor provided the Tribunal with facts and arguments relevant to this claim. He denies that "he (or his attorney) were responsible of any negligence or contempt of court" and contends that because the EPO made a counterclaim he had to continue his complaint to preserve his rights. By setting a deadline for him to withdraw his complaint so that it would not have to file a reply with the Tribunal, the Organisation has shown concern only for saving costs without regard for the staff member's right to legal redress. He asks the Tribunal to reject the Organisation's counterclaim and instead award him 2,000 German marks in "punitive costs" or "moral damages" and 1,000 marks in costs.

E. In its surrejoinder the EPO notes the withdrawal of the complaint as to the merits. However, the filing of a rejoinder, which requires the Organisation's surrejoinder, is proof that it is the complainant who is merely trying to increase the workload of the Organisation and the Tribunal. It says that its position in this particular complaint does not contest the right of staff, in general, to lodge complaints with the Tribunal to defend legitimate interests. The Organisation presses its counterclaim.

CONSIDERATIONS

1. The complainant, an employee of the European Patent Office, the secretariat of the EPO, is of Italian nationality and serves in Munich. On 26 February 1999, he filed a complaint requesting the Tribunal to set aside a decision by the President of the Office refusing him the expatriation allowance provided for under Article 72(1) of the Service Regulations. The complaint was based on identical arguments to those made by forty-one employees of the Office, whose claims were dismissed in Judgment 1864 (*in re* Andrews and others), delivered on 8 July 1999. The Principal Director of Legal Services advised the complainant on 14 July 1999 of the existence of Judgment 1864 and indicated to him that:

> "it would appear appropriate to us, both in your interests and those of the EPO, for you to envisage – freely – the possibility of withdrawing your complaint."

2. Having received no reply to this letter within the period indicated therein – namely, before 21 July 1999 – the EPO stated in a brief to the Tribunal dated 27 July that the complainant had shown disregard for his employer, firstly by filing his complaint later than his colleagues, which prevented its joinder with theirs, and subsequently by maintaining a

challenge which clearly could not succeed. Therefore, the EPO makes a counterclaim, requesting the Tribunal to find that the complaint is an abuse of process and to order the complainant to bear the costs.

3. In his rejoinder the complainant decides not to pursue further his complaint as to its merits, but he does not withdraw suit. Indeed, he requests the Tribunal not only to dismiss the EPO's counterclaims, but also to order the defendant to pay him 2,000 German marks in damages and 1,000 marks in costs.

4. The Tribunal will rule, firstly, on the issue of whether the complainant's failure to withdraw suit constitutes an abuse of process for which he could be ordered to pay the costs incurred in whole or in part. In accordance with Judgment 1884 (*in re* Vollering No. 15), the Tribunal asserts unequivocally that it has the inherent power to impose costs on a complainant because:

> "frivolous, vexatious and repeated complaints to the Tribunal absorb the latter's resources and impede its ability to deal expeditiously and fully with the many meritorious complaints which come before it. They are also, of course, costly and time-wasting for the defendant organisation."

However, the Tribunal considered it important to point out that such power must be exercised only in exceptional cases, since "it is essential that the Tribunal should be open and accessible to international civil servants without the dissuasive and chilling effect of possible adverse awards of costs".

5. In the present case, it is clear that a full withdrawal of suit would have been desirable once Judgment 1864 had upheld the rules on expatriation allowance for EPO employees. However, neither the fact that the complainant filed his complaint later than his colleagues, nor his failure to reply to the invitation made by the Legal Services to withdraw suit in the week following 14 July 1999, can be considered as constituting abuse. The Tribunal finds that in the circumstances, this is not one of the exceptional cases in which it could penalise the filing or maintenance of a complaint as being abusive. It therefore dismisses the EPO's counterclaims.

6. The new claims made by the complainant in his rejoinder must also fail. He cannot allege any prejudice arising from the completion of a process which he had himself initiated, nor can he claim the payment by the EPO of the costs incurred, since his main claims had no chance of being entertained and were, moreover, withdrawn.

DECISION

For the above reasons,

1. The withdrawal of the claim to set aside the decision by the President of the Office, dated 1 December 1998, and of the claims for damages made in the complaint of 26 February 1999 is recorded.
2. The EPO's counterclaims are dismissed.
3. The claims made in the rejoinder of 2 September 1999 are dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Registry's translation, the French text alone being authoritative.

EIGHTY-NINTH SESSION

***In re* Rauter (No. 2)** **Judgment No. 1963**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Anton Rauter against the European Patent Organisation (EPO) on 1 March 1999 and corrected on 29 March, the EPO's reply of 4 June, the complainant's rejoinder of 10 September, and the Organisation's surrejoinder of 12 October 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some facts relevant to this case are set out in Judgment 1864 (*in re* Andrews and others). Mr Rauter was also a complainant in the case which led to that judgment. He has Austrian nationality and was born in 1948. He joined the European Patent Office, the secretariat of the EPO, in 1983 as an examiner, and was stationed in Munich, Germany. As indicated in Judgment 1864, when the complainant joined the EPO he had already been resident in that country for more than three years and was not, therefore, eligible to receive an expatriation allowance. The expatriation allowance is awarded to permanent employees who meet the conditions set out in Article 72(1) of the Service Regulations for Permanent Employees of the European Patent Office. It is payable to permanent employees if, at the time of taking up their duties, they "hold the nationality of a country other than the country in which they will be serving" and "were not permanently resident in the latter country for at least three years".

At its 39th Session, held in December 1990, the EPO's Administrative Council adopted an amendment to Article 72 of the Service Regulations lifting restrictions based on staff category. However, the amendment made no changes to the three-year disqualifying period of prior residence in the host country. Nevertheless, the Council "noted", in point 106 of the minutes of its meeting, that the Office would submit to the Council a revised proposal regarding an extension of the period of prior residence.

The complainant repeatedly asked the then President of the Office when he would submit the proposal referred to in point 106 of the minutes. The President always insisted that for the time being he would not be taking concrete action on the issue. In a letter of 5 February 1996 the complainant and forty other employees addressed the same request to the new President of the Office. The President replied in a letter of 14 March reiterating the view of his predecessor that for the time being no action would be taken. By a letter of 9 July the complainant again took up the issue with the President. On 23 July the President replied, referring back to his letter of 14 March.

In mid-October 1996 the complainant filed an internal appeal contesting the President's refusal to act and requesting that the President be ordered to submit a proposal revising Article 72(1) b). In its report of 5 November 1998 the Appeals Committee unanimously recommended rejecting the complainant's appeal. On 8 December 1998 the Director of Personnel Development informed the complainant that the President was upholding the opinion of the Appeals Committee that the complainant had no legal basis to request the President to act. That is the impugned decision.

B. The complainant contends that he has been adversely affected by the President's delay in submitting a proposal and by the Administrative Council's acceptance of his failure to act. He argues that in 1990 the Council "had evidently wished to give expression to the urgent need for an early amendment" to Article 72 and that "it can be assumed that the only obstacles in the way of an amendment were primarily formal in nature and that no further fundamental consideration was necessary".

He argues that the three-year disqualifying period under Article 72(1) of the Service Regulations "results in unequal treatment" and that the only way to ensure equal treatment based on the Universal Declaration of Human Rights is to extend entitlement to the expatriation allowance to all non-nationals.

The complainant requests that the President's decision rejecting his appeal be quashed and that the President "be required to submit a proposal to the Administrative Council as set down in point 106 of the minutes ... of the Council's 39th meeting". He also requests that he be paid the expatriation allowance retroactively from 1 July 1990.

C. The Organisation challenges the receivability of the complaint. The claim to order the President to submit a proposal for amending Article 72 of the Service Regulations does not come within the scope of the Tribunal's competence as defined in Article II, paragraph 5, of the Tribunal's Statute. In addition, neither the European Patent Convention nor the EPO Service Regulations vest in a civil servant the right to make such a request. It says that it is for the Council alone to decide what amendments it adopts and what actions it thinks fit. Furthermore, even if his claim regarding the proposal were found to be receivable under Article II(5) of the Tribunal's Statute, it is nevertheless time-barred and consequently irreceivable.

As for his claim to the expatriation allowance, the Organisation cites Judgment 725, *in re* Hakin No. 7 under 4, in which the Tribunal has held that identical claims may not be twice submitted to the same instance and, therefore, submits that the complainant's claim for the allowance is irreceivable since it has already been put before the Tribunal in Judgment 1864.

Subsidiarily on the merits, the EPO explains that since the substance of the complainant's pleas have been argued at length in *in re* Andrews and others, it has only summarised the arguments it put forward in the context of that case. First, the President is under no obligation to act since, according to the minutes of the Council's 39th meeting, the Council merely "noted" that a proposal would be submitted by the Office. Secondly, the three-year disqualifying period found in Article 72(1) b) does not violate the principle of equality of treatment because it is consistent with criteria applied by the Tribunal in Judgment 754, *in re* Metten No. 4. According to those criteria, "where the circumstances differ, so may the treatment provided that it is a fair, reasonable and logical outcome of the difference". Finally, the Tribunal's well-established case law defines discrimination as "different treatment of staff members who are in the same administrative position". In this respect the complainant is not being treated differently than other permanent employees that have lived in the host country for more than three years before commencing employment with the Organisation. The EPO adds that there was no breach of the Universal Declaration of Human Rights.

D. In his rejoinder the complainant clarifies the difference between the present complaint and that which was examined in Judgment 1864. He points out that it was the wording of Article 72 of the Service Regulations which was at issue in *in re* Andrews and others, whereas in this present case he is requesting that the President of the Office submit a proposal regarding the extension of the period of prior residence. He rebuts the Organisation's view that his complaint is irreceivable because this complaint has arisen from a decision taken on his individual appeal, which constituted an impugnable decision that he challenged in a timely manner. The impugnable decision of *in re* Andrews and others arose out of a joint appeal. He argues that the complaint is well-founded and that at its 39th meeting the Administrative Council wished to improve the system, particularly as in his opinion "no fair, reasonable and logical difference between expatriates exists". Any action in that sense requires the President to submit a proposal.

E. In its surrejoinder the Organisation points out that the complainant introduced no new arguments in his rejoinder. Nevertheless, it presses its argument regarding the similarities between the "substance of the claim" and the "material facts" in the present complaint and those in the complaints which led to Judgment 1864, and reiterates that his complaint is irreceivable.

In addition, since the complainant is asking for the same relief under this complaint, it offends against the *res judicata* rule. By merely "noting" that the Office would be submitting a proposal, the Council did not create any legal basis for the complainant's claim.

CONSIDERATIONS

1. The complainant is one of the forty-one employees of the European Patent Office who unsuccessfully complained to the Tribunal concerning the application in their case of Article 72(1) of the Service Regulations for employees of the Office relating to the conditions required for the payment of the so-called expatriation allowance. In Judgment 1864 (*in re* Andrews and others), delivered on 8 July 1999, the Tribunal found that the rules governing the granting and retention of the right to be paid the expatriation allowance were no doubt debatable and had been challenged on several occasions; however, even so, it held that the fixing of a length of residence of three years in the host country, prior to employment, for employees of foreign nationality, beyond which period an employee may not be considered as an "expatriate", was neither unreasonable nor a breach of the principle of equality.

2. On the basis that the Administrative Council had "noted", at its meeting in December 1990, that a proposal to amend the rules governing the length of the period of prior residence would be submitted by the Office "as soon as possible", the complainant on several occasions requested the President of the Office to submit a proposal to the Council on the matter. On 23 July 1996, in response to a recent inquiry by the complainant, the President referred to an earlier letter, of 14 March 1996, in which he had refused to submit a proposal to the Council to amend Article 72(1) of the Service Regulations. The complainant then referred the matter successively to the Appeals Committee and the Administrative Council which, in line with the opinion of the Appeals Committee, refused to give him satisfaction.

The complainant is now asking the Tribunal to set aside the President's decision of 8 December 1998 rejecting his internal appeal and to require the President to submit a proposal to the Administrative Council to amend the rules governing the expatriation allowance. He is also seeking the payment of the above allowance as from 1 July 1990.

3. Once Judgment 1864 had been delivered, the EPO informed the complainant that it would appear appropriate "both in his interests and those of the EPO" that he should envisage withdrawing suit. However, the complainant, who also believes that he is in a position to criticise the above judgment, decided that he should press his complaint, on which the Tribunal will therefore rule.

4. The Tribunal partially upholds the Organisation's plea of *res judicata* raised in its surrejoinder. The complainant's claims for the retroactive payment of the expatriation allowance have already been dismissed in Judgment 1864 and he has no valid reason to challenge the Tribunal's final decision, even though he criticises the fact that there is no possibility open to him for revision of that judgment.

5. On the other hand, the claims asking that the President of the Office should submit a proposal to the Administrative Council to amend Article 72(1) of the Service Regulations were not contained in the complaints which gave rise to Judgment 1864. *Res judicata* cannot, therefore, apply here.

6. The claims must, in any event, fail. The complainant does not plead any breach of his contractual or statutory conditions of employment. He wants the President to be ordered to intervene so that the Administrative Council amends the Service Regulations. However, firm precedent has it that the Tribunal may not order such action (with reference to the EPO, see Judgments 1456, *in re* Belser and others, and 1591, *in re* Popineau No. 13). Only in the event that the Office were under an obligation to change its rules in order to ensure respect for the fundamental conditions of service of staff members would the latter, faced with the silence or inaction of the administration, be entitled to challenge the unlawfulness of their situation.

In the present case, however, it is fully within the competence of the President and the Administrative Council to amend or not the impugned provisions of the Service Regulations. Admittedly, the Council "noted" at its 39th Session in December 1990 that the Office would submit a proposal to this effect "as soon as possible". Yet this implied no obligation for the President who, for reasons which he alone can appropriately judge, has not considered it possible to submit such a proposal. It follows that the complainant cannot plead any breach of his fundamental rights or guarantees as a result of the maintenance of rules which, as ruled in Judgment 1864, are not unlawful.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Liaci** **Judgment No. 1964**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Fabio Liaci against the European Patent Organisation (EPO) on 10 July 1999 and corrected on 20 September, the EPO's reply of 9 December 1999, the complainant's rejoinder of 29 February 2000 and the Organisation's surrejoinder of 4 April 2000;

Considering Articles II, paragraphs 5 and 7, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Under Article 8 d) of the Service Regulations of the European Patent Office, the EPO's secretariat, to be eligible for appointment as a permanent employee a candidate must "meet the physical requirements of the post".

Article 9 of the Service Regulations which refers to the initial medical examination required on recruitment specifies that, before being appointed, a successful candidate shall be "medically examined by a medical practitioner designated by the President of the Office" in order to satisfy the appointing authority that the candidate fulfills the requirements of Article 8 d).

Article 2 of the Pension Scheme Regulations of the Office reads as follows:

> "Where the medical examination which every employee has to undergo at the time of his appointment shows him to be suffering from an illness or disablement, the Office may decide that, as regards risks arising from an illness or disablement existing before he took up his duties, the said employee shall not be entitled to the invalidity or death benefits provided for in these Regulations until the expiry of a period not exceeding five years from the date on which he entered the service of the Organisation ..."

The complainant, who holds both Italian and Swiss nationality, was born in 1967. In April 1996, following the publication of a vacancy notice in the press, he applied for a post of patent examiner in Directorate General 1 (DG1) at the EPO's Sub-office in Berlin. On 26 November 1998, the Head of Administration sent him a letter in which he offered him the above post as from 1 February 1999, while indicating that the appointment was conditional upon his complying with the requirements of Articles 8 and 9 of the Service Regulations. By a letter of 21 December 1998, the complainant replied to the Head of Administration accepting the offer of employment.

On 8 January 1999, the complainant's initial medical examination was carried out by his own doctor. The results were sent to the EPO's medical adviser. At the end of January, the Head of the Personnel Section in Berlin informed the complainant that the date of his entry on duty had been postponed to 1 April 1999, as the medical adviser had considered that he did not meet the medical requirements for appointment. In a letter dated 21 January, the medical adviser made a recommendation to the complainant, who had "considerable excess weight" and whose liver test results were found to be of a "pathological nature", to lose weight with a view to helping him meet the medical requirements mentioned above. By a letter dated 12 February, the Head of the Personnel Section confirmed the postponement of the date of his taking up employment until 1 April.

At the beginning of March, a further medical examination of the complainant was carried out by his doctor. In a letter of 10 March, the latter informed the medical adviser that the medical condition of his patient was "on a par" with that of January 1999, but that his condition could not serve as grounds "for exclusion". Following a telephone conversation with the complainant on 24 March, the Head of the Personnel Section confirmed to the complainant in an e-mail sent to him the same day that he could not be appointed on 1 April as foreseen, as the medical adviser had not certified him fit to perform the duties of the post. During the telephone conversation, the complainant requested that the matter be referred to the Invalidity Committee. By a letter of 8 April 1999, the Head of Administration informed the complainant that the EPO was withdrawing the offer of employment made on 26 November 1998 since he did not fulfil the medical requirements for appointment. By an e-mail of 14 April 1999, the complainant accepted that decision.

By a letter of 7 May the complainant appealed to the President of the Office against the decision to withdraw the offer of employment. Having received no reply from the Administration, he filed the present complaint on 10 July. In a letter of 13 July, the Director of Personnel Development informed him that the President had decided to refer the matter to the Appeals Committee for an opinion.

B. The complainant contends that the Tribunal is competent *ratione materiae* and *ratione personae* under the terms of Article II(5) of its Statute. In accordance with the Tribunal's case law, this Article does not only apply to officials who have benefited from a formal act of appointment, but also to those with whom the international organisation has concluded a contract with a view to their appointment. In the material case, the exchange of letters of 26 November and 21 December 1998 resulted in the conclusion of a "conditional contract of appointment" between the parties, which the complainant alleges was breached.

On the merits, the complainant submits that the medical adviser drew manifestly wrong conclusions from the evidence. Article 8 d) of the Service Regulations does not require future employees to be "in perfect health"; what matters is that any illness or disablement should not render them incapable of discharging their functions. Citing the Service Regulations and Article 2 of the Pension Scheme Regulations, he endeavours to show that the fact that someone might be suffering from an illness or disablement does not constitute sufficient grounds for refusing to appoint that person, and that it is also necessary for the medical adviser to explain how such an illness renders the candidate incapable of discharging his functions. In his case, the complainant never received such an explanation. Moreover, the evaluation of physical capacity should not hinge on medical requirements for appointment "determined in an arbitrary manner" by the Administration or the medical adviser. Such criteria, which are not listed, only serve in practice to bring within the scope of Article 8 d) of the Service Regulations those illnesses and disablements which are in fact covered by Article 2 of the Pension Scheme Regulations. While the objective of Article 2 is to avoid "an excessive risk" for the Organisation's health insurance scheme, Article 8 d) is meant to exclude applicants who, for physical reasons, would not be capable of discharging the functions for which they are recruited. The complainant refers back to the opinion of his doctor and the professional activities which he was performing before and after the facts of the present case, and states that he is physically capable of discharging the functions of examiner.

Finally, he submits that his case should have been referred to the Invalidity Committee. By refusing to accede to his request, the EPO denied him a "fundamental procedural safeguard".

The complainant requests the Tribunal to set aside the President's implicit decision to reject his appeal of 7 May 1999 and to order any consequent redress, including: ordering the appointment of the complainant as from 1 February 1999, or subsidiarily from 1 April 1999, and authorising him to enter into service without further delay and without prejudice to the application, if appropriate, of Article 2 of the Pension Scheme Regulations; and, subsidiarily, to order that the dispute concerning the medical adviser's opinion be referred to the Invalidity Committee so that it can decide upon the physical aptitude of the complainant and whether Article 2 of the Pension Scheme Regulations should be applied. In this respect, the Tribunal would have to specify the scope of Article 2 and of Article 8 d) of the Service Regulations. Furthermore, the complainant requests the Tribunal to order the EPO to pay him the remuneration which he would have received had he entered service on 1 February 1999 and compound interest of at least 10 per cent per year on the amounts due from the date on which his appeal was lodged, as well as 20,000 German marks in moral damages and 5,000 marks to reimburse the costs he had incurred as a result of the impugned decision and the present complaint. He also wants the EPO to pay costs.

C. In its reply the EPO argues that the complaint is irreceivable as the Tribunal is not competent *ratione personae*. On 1 December 1977, the Organisation only recognised the jurisdiction of the Tribunal within the limits determined by the European Patent Convention. Article 13(1) of the Convention provides that "employees and former employees" may apply to the Tribunal "within the limits and subject to the conditions laid down in the Service Regulations for permanent employees or the Pension Scheme Regulations". However, the status of employee is only acquired through appointment. Under the terms of the Service Regulations, appointment depends on the selected candidate's meeting the physical requirements referred to in Article 8 d) of the Service Regulations. The contract of appointment concluded by the candidate's acceptance of the offer made by the Office places the latter under the obligation to appoint the candidate. However, the Office is freed from that obligation if the candidate does not meet the requirement referred to in Article 8 d) as the appointment can no longer be made. As a consequence, it was not possible to appoint the complainant. Having failed to acquire the status of employee, he can neither claim to come within the jurisdiction of the Tribunal, nor within the scope of the Service Regulations and the Pension Scheme Regulations. Therefore, the claims whereby he seeks his appointment, the referral of the matter to the Invalidity Committee and the payment of the various sums are irreceivable. The EPO adds that the complainant's claim to be appointed as from 1 February 1999 is also irreceivable insofar as he lodged his internal appeal more than three months after he had been informed of the decision not to appoint him from that date.

Subsidiarily, the EPO submits that it is in the interests of the Office, which appoints its employees for life, to ensure that they enjoy a state of health, at least at the time of their recruitment, which gives grounds for hoping that they will be capable of discharging their functions for as long and as effectively as possible. It is in this sense that Article 8 d) should be interpreted. When undertaking an initial medical examination, the medical adviser must take into account the foreseeable development of any symptoms the candidate had at the time of his recruitment. In the material case, the results of the examinations carried out in March 1999 were "hardly encouraging" insofar as within the period accorded to him, the complainant had not been able or had not wished to ensure that the results of the new tests would be favourable. The EPO also cites the case law of the Court of Justice of the European Communities under which, in the event of doubt concerning the state of health of a candidate, "the institution cannot be obliged to take the risk of recruiting him". Finally, the EPO emphasises that the decision taken by the medical adviser was based on the test results provided by the complainant himself and not on criteria that were arbitrary.

D. In his rejoinder the complainant maintains that his complaint is receivable. He contends that an international organisation cannot make a reservation with regard to its acceptance of jurisdiction and doubts that the letter of 1 December 1977 contains such a reservation. Moreover, in accordance with its case law, the Tribunal could not take such a reservation into account. The complainant emphasises that Articles 106 and 107 of the Service Regulations, relating to appeals, refer to "a specific individual to whom these Service Regulations apply", which includes the candidates covered by Articles 7 to 9. Furthermore, the postponement of his entry into service was only a precautionary measure while awaiting the definitive decision of the Office, which was made on 8 April 1999. Until the Office had taken that decision, the complainant could still expect his appointment as from 1 February. The internal appeal was filed on 7 May and is therefore receivable *ratione temporis*.

With regard to the case law mentioned by the EPO, the complainant observes that in the case it cited, the candidate had refused to submit to a medical test. The situation was different in his own case. Furthermore, he affirms that according to the Community case law, this examination must reveal a risk liable to affect the discharge of functions in the foreseeable future, which excludes potential and long-term risks.

E. In its surrejoinder the EPO observes that the Tribunal, whose jurisdiction is limited, reserves the right to examine, as in the present case, the effect of a limitation of that jurisdiction inherent in the recognition of its competence. The Service Regulations, under the terms of Article 1, only apply to permanent employees. In accordance with Article 109(3) the right of recourse to the Tribunal is reserved for permanent employees or former employees. It would therefore be incorrect to give a different interpretation to Articles 106 and 107. Moreover, the decision taken at the end of January 1999 to postpone the complainant's date of entry into service was definitive, as has been acknowledged by the complainant in a letter of 29 January 1999. The internal appeal was therefore time-barred.

The EPO adds that the Appeals Committee, which issued its opinion on 31 January 2000, unanimously recommended the dismissal of his internal appeal as being without merit and upheld the decision of the medical adviser.

CONSIDERATIONS

1. The complainant, a graduate of the Federal Institute of Technology of Lausanne, applied in April 1996 for a post of patent examiner at the Berlin Sub-office of the European Patent Office. After having entered the competition organised to fill the post, he received a letter dated 26 November 1998 from the Head of Administration offering him the post as from 1 February 1999, subject to his complying with the requirements of Articles 8 and 9 of the Service Regulations. Those articles provide that a candidate should produce certain certificates as well as meet the physical requirements of the post as verified by an initial medical examination. The complainant accepted the offer on 21 December 1998 and after some exchanges of letters, underwent the initial medical examination on 8 January 1999. Having received the results of the examination which had been carried out by the complainant's own doctor, the Office's medical adviser wrote to him on 21 January 1999 mentioning the "pathological nature" of his liver tests and his "considerable excess weight". The medical adviser proposed that he lose weight in order to meet the medical requirements for recruitment to the Office. The entry into service of the complainant was postponed until 1 April 1999. After the complainant had undergone a further medical examination in March 1999, the results were passed on to the EPO's medical adviser who was not able to certify him fit to perform the duties of the post. As a result of that medical opinion, on 8 April the EPO withdrew its earlier offer of employment. The complainant, having first admitted that

this was the best solution, then changed his mind and appealed against the decision of 8 April 1999. He has filed this complaint with the Tribunal challenging the implied rejection of his claims. He requests the Tribunal to order the EPO to appoint him as from 1 February 1999 or from 1 April 1999. In a subsidiary plea, he requests the referral of the matter to the Invalidity Committee as provided for under Articles 89 *et seq.* of the Service Regulations. He also claims payment of the remuneration that he should have received, as well as damages for the moral injury caused by what he considers to be a breach of his contract of appointment.

2. The case raises a delicate issue of jurisdiction. The EPO contests the Tribunal's competence to examine a case concerning an applicant for a post who has not been granted the status of employee and whose contract of appointment was subject to a condition which finally was not fulfilled. The EPO has only recognised the Tribunal's jurisdiction within the limits set out in Article 13(1) of the European Patent Convention, under the terms of which:

> "Employees and former employees of the European Patent Office or their successors in title may apply to the Administrative Tribunal of the International Labour Organisation in the case of disputes with the European Patent Organisation in accordance with the Statute of the Tribunal and within the limits and subject to the conditions laid down in the Service Regulations for permanent employees or the Pension Scheme Regulations or arising from the conditions of employment of other employees."

According to the EPO, as the complainant was not appointed as an employee and did not enter the service of the Organisation because he failed to meet the physical requirements set out in Article 8 d) of the Service Regulations, he cannot benefit from the Tribunal's jurisdiction.

3. In rebuttal the complainant refers to Article II(5) of the Statute of the Tribunal and to the case law, particularly in Judgments 307 (*in re* Labarthe), 339 (*in re* Kennedy) and 621 (*in re* Poulin). Article II(5) of the Statute of the Tribunal says:

> "The Tribunal shall ... be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal

> administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure, and which is approved by the Governing Body."

In Judgment 307, cited by the complainant, the Tribunal found that it was competent to examine a dispute submitted to it by a complainant who, even without being appointed to a post in an international organisation, was covered by a "binding contract". In that case, the Tribunal found that:

> "There is a binding contract if there is manifest on both sides an intention to contract and if all the essential terms have been settled and if all that remains to be done is a formality which requires no further agreement."

In Judgment 339, the Tribunal found that, where the complainant establishes the existence of a binding contract of appointment with the organisation, but there is a dispute about the matter, it is a dispute on which the Tribunal is competent to rule. Finally, Judgment 621 recalls that, for a contract to arise, there has to be "an unquestioned and unqualified concordance of will on all terms of the relationship", in the sense that both parties have shown contractual intent, all the essential terms have been worked out and agreed on, and all that remains to be settled is a formality requiring no further agreement. The complainant deduces from this case law that, in view of his acceptance of the EPO's offer, followed by the letter accepting his candidacy, he is indeed covered by a conditional contract of appointment which is binding on the Organisation. Although the resulting obligations are undoubtedly subject to a condition, namely, the physical aptitude of the applicant to discharge his functions, this is an objective condition over which the parties have no control and which does not require any new agreement.

4. Although this analysis is not without merit, the Tribunal cannot agree with it. It is within the competence of the Tribunal to determine whether or not there is a contract of appointment by which the parties are bound and which would entitle the official covered by the contract to the rights enjoyed by the officials of an organisation that has recognised the Tribunal's jurisdiction. However, in the material case, the EPO's agreement to appoint the complainant was subject to the fulfilment of a condition which cannot be said to be a mere formality, namely, recognition that he was physically fit enough to discharge his functions. The complainant was not appointed as an employee of the EPO, and under Article 8 d) he could

not have been appointed as a permanent employee unless he met "the physical requirements of the post". Consequently, the complainant, who has never been an employee of the EPO, is raising a matter which is not within the scope of the Tribunal's competence. The Tribunal can only refer to its Statute and to Judgments 803 (*in re* Grover) under 3 and 1554 (*in re* Tögl) under 10, which exclude from its jurisdiction external candidates for employment and persons who have not concluded a contract of employment of which all the essential terms have been agreed. The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-NINTH SESSION

***In re* Awoyemi (Nos. 2 and 3)**
(Application for execution)

Judgment No. 1965

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 1756 filed by Mr Saliu Yinka Awoyemi on 1 June 1999, the reply of 9 July from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the complainant's rejoinder of 20 October and the Organization's surrejoinder of 25 November 1999;

Considering the second application for execution of Judgment 1756 filed by Mr Awoyemi on 11 August 1999, the reply of 30 November 1999 from UNESCO, the complainant's rejoinder of 6 March 2000, and the Organization's surrejoinder of 12 April 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 1756 (*in re* Awoyemi), delivered on 9 July 1998, to which reference is made, the Tribunal set aside in part the impugned decision and invited the Director-General to take a new decision as explained under 12. The complainant was also granted 15,000 French francs in costs.

This sum was paid by the Organization.

On 25 September 1998 and 23 March 1999, the complainant requested a new decision.

Having received no reply, he filed an application for execution of the judgment on 1 June 1999 (*in re* Awoyemi No. 2).

On 8 July 1999, the Organization sent the complainant a copy of the report of the Inspector-General, dated 26 October 1998, and informed him that, in the absence of any responsibility on the part of UNESCO, he was not entitled to any moral damages.

The complainant is challenging that decision, which he considers to be in breach of Judgment 1756, in a second application for execution (*in re* Awoyemi No. 3).

In its reply to the first application for execution, UNESCO contends that it executed Judgment 1756 correctly and refers in particular to its communication of 8 July 1999.

2. As both applications seek the execution of the same judgment, they are joined to form the subject of a single judgment.

The first application

3. The only reason for filing the first application for execution was the absence of any decision or communication from UNESCO pursuant to the above judgment.

Insofar as it is based on the failure of the Organization to execute the judgment, the application is now groundless following the communication of 8 July 1999 and the complainant no longer has cause of action. Otherwise, the pleas contained in the first application will be examined in the context of the second.

4. The complainant is entitled to costs for his first application if it was justified at the time that it was filed (see Judgment 1920, *in re* Abdul-Quader).

The time necessary for the execution of a judgment depends on the circumstances, and particularly the action required of the Organization (see Judgment 1812, *in re* Argos No. 2 and others). In the present case, the

Organization had to provide information to the complainant, if necessary after an additional inquiry. The nature of the case meant that this should have been done without delay. The communication was sent to the complainant one year after the delivery of the judgment. On 1 June 1999, the complainant had good grounds for complaining of an unjustified delay. He is therefore still entitled to costs, the overall amount of which will be determined after the second application has been examined.

The second application

5. In Judgment 1756, the Tribunal considered the following facts. At 6.45 a.m. on 3 November 1995, members of the drugs squad of the French police went to the home address of the Awoyemi couple, both employees of UNESCO in Paris. They were taken to police headquarters, where they were questioned until about 5 p.m., in particular, on their relationship with their supervisors. One of the supervisors, Mr L., Assistant Director-General, was reported to have received a threatening anonymous letter. According to Mr and Mrs Awoyemi, the police had a letter which might have been from the Director-General. A few days later, they reported the incident to the Organization and asked whether it had prompted the police investigation which they had been put through. They requested the opening of an inquiry but they received no reply. The Tribunal found that Mr Awoyemi (the only party to the suit) had the right to know whether UNESCO had prompted the above-mentioned events and to the opening of an inquiry. The conclusion was that the Director-General was invited to take a new decision on disclosure of the information requested, including the report of the Inspector-General on the inquiry, if it existed, or of a new inquiry, if need be. He also had to answer the claim to moral damages (see under 12).

By a memorandum of 8 July 1999, the Director of Personnel, acting on behalf of the Director-General, sent the complainant the report drawn up by the Inspector-General on 26 October 1998. It concluded that neither the Organization, nor any of the members of its staff, had prompted the incident. There were therefore no grounds for granting the complainant moral damages.

In his report on the inquiry, the Inspector-General stated that:

> "In 1995, at the material time, I personally carried out an inquiry and reached the conclusion that '*there was nothing to indicate [...] that the police search carried out at Mr and Mrs Awoyemi's home could have been done at the request or with the authorisation of any authority of UNESCO*'.
>
> Admittedly, at the same time, Mr L. ... had been the victim of attempted extortion with threats against his relatives and had made a complaint in his personal capacity. In the context of that case, you had given written authorisation for '*agents [or officials of the French Republic] to enter UNESCO premises to discharge their functions for judicial purposes within the context of the complaint filed [by Mr. L.]*'.
>
> I therefore reopened the inquiry and conclude that the L. and Awoyemi cases do not appear to be linked for the following reasons:
>
> - Mr and Mrs Awoyemi state in their complaint that the police officers were in possession of a letter bearing your signature and claimed that it authorised the police search. My inquiry found no trace of such a letter in the Secretariat: it is possible, but not certain, that the letter was the one that you had signed in the context of the L. case;
> - During their investigation at headquarters in the L. case, the police requested access to the files of a retired official and two serving officials (who were not Mr and Mrs Awoyemi). It may be noted that their request was granted in the first case, but not in the other two;
> - Furthermore, according to Mr Awoyemi, the couple were taken to the premises of the drugs squad, whereas the police officers who intervened in UNESCO in the L. case were from the criminal investigation department;
> - I met Mr Awoyemi, who believes that he was denounced to the police during their investigation of the L. case. I then questioned the officials whom I knew to have already been interrogated by the police, none of whom admitted to having denounced Mr Awoyemi.
>
> Under these conditions, unless the police were to be questioned, which would amount to the Organization acting as a substitute for Mr Awoyemi (as he requests and as, it appears to me, the Organization has constantly refused to do), I consider that no additional inquiry is needed."

6. In his application for execution of 11 August 1999, Mr Awoyemi requests the Tribunal to:

> "order, in particular, any consequent redress for the failure to execute Judgment 1756 ... that is to order UNESCO, under penalty of 10,000 French francs for each day of delay, starting from the date on which the judgment is delivered in the present case:
>
> (a) to execute Judgment No. 1756 ...
>
> (b) to pay [him] an amount equivalent to 6 months' salary for the aggravation of the moral damage due to the failure to execute Judgment No. 1756 cited

> above, irrespective of any other amount which the Tribunal may grant as the main redress under this head ..."

The complainant's pleas are as follows: the distinction drawn in the present case between a drug-related case and a civil action is not applicable, since he was never involved in a drug-related case, and the questions which the police asked him concerned only the L. case. He says that the Director-General's written authorisation to the police to conduct an investigation on the premises of UNESCO in relation to the L. case is an important new fact. In addition, the report shows that the French police did indeed carry out an investigation in UNESCO. As there was only one case, it must therefore be deduced that the origins of the police investigation at the complainant's home are to be found in UNESCO. In his opinion, the Organization is responsible "even though it is impossible, from the current evidence, to identify individual responsibilities". As its responsibility is "full and total", it should be ordered to pay him moral damages as a result of the police investigation and its consequences.

The Organization argues that the application should be dismissed. It contends that it fully executed Judgment 1756. With regard to the inquiry, it refers to the report of the Inspector-General, which was sent to the complainant. It also provides the following information: on 28 October 1995, following the penal charges brought by Mr L. concerning the "death threats which he had received", the Director-General wrote to the public prosecutor to inform him that he authorised police officers to enter the premises of UNESCO to carry out their duties for judicial purposes in this affair. On 12 October 1995, an identical authorisation, requested by a police superintendent following the murder of a UNESCO official, had been granted by the Assistant Director-General on behalf of the Director-General. On 23 November 1995, the criminal investigation department requested authorisation to consult the personnel files of a former official and two other serving officials. However, the latter were not Mr and Mrs Awoyemi. The Organization authorised the consultation of the former official's file, but refused access to the personnel files of the two serving officials before they had been informed. The Organization observes that the investigation at the complainant's home on 3 November 1995 was ordered by a warrant issued by an investigating judge and, in view of the specialisation of the branch of police which undertook the investigation, it expresses doubts as to its relationship with the charges brought by Mr L. The Organization has provided the Tribunal with the names of all the persons who were questioned during the first internal inquiry (prior to Judgment 1756) and the second inquiry (after the judgment). Some ten persons were questioned, principally those who had already been questioned by the police in relation to Mr L.'s case. UNESCO affirms that it appears that no reprehensible behaviour was found and, in the absence of any fault by the Organization, no moral damages are due.

7. In Judgment 1756, the Tribunal invited UNESCO to inform the complainant of the result of an inquiry to determine whether the Organization had prompted the investigation and detention of the Awoyemi couple by the police on 3 November 1995 and to answer his claim to moral damages.

UNESCO fulfilled both of the above. To that extent, it executed the judgment.

8. Nevertheless, the complainant contends that UNESCO fell short of the execution of the judgment. He considers that the Organization prompted the events which he had to go through and that it should therefore compensate him.

(a) In that judgment, however, the Tribunal never found or suggested that the Organization itself or any of its officials might have been responsible for any communication to the police which might have prompted the police investigation. The requested inquiry, which was based on the mutual respect due between an Organization and its officials, was only intended to clarify the facts, particularly with a view to determining whether any responsibility could be attributed. In that regard, it should be recalled that in their host country agreements international organisations are bound to respect national legislation and collaborate with the services of the host country to combat crime. Assistance provided to the police for this purpose, with a view to the identification of an offender, is not unlawful in itself.

(b) Despite the brevity of the Inspector-General's report, UNESCO's inquiry corresponds to what was expected from Judgment 1756. The Inspector-General heard all the persons who had been questioned by the police (with the exception of Mr L., who had already been questioned during the first inquiry), as well as other persons, and it may reasonably be considered that, had any blameworthy behaviour by any of the officials come to light, it would have been reported.

Even if the letter from the Organization which the police is said to have shown the Awoyemi couple on 3 November 1995 was the letter of 28 October 1995 concerning the L. case, no fault by UNESCO in respect to one of its officials would be proven.

The same would be true if the police investigation had been prompted by objective information received from officials of the Organization on its premises or outside them.

The inquiry was therefore sufficient and revealed no fault which could be held against the Organization or any of its officials.

(c) The claim for moral damages in the case which gave rise to Judgment 1756 was based, firstly, on the complainant's allegation that the Organization was responsible for the police investigation and, secondly, on the refusal of the complainant's request for the disclosure of information. In Judgment 1756, the Tribunal implicitly found that it would be preferable to rule on the matter as a whole.

In fact, the inquiry revealed no evidence of the Organization's responsibility for the police investigation. The Director-General therefore rightly rejected the claims on this point.

However, the unjustified refusal to disclose information found in Judgment 1756 seriously harmed the complainant's personal interests. Damages are therefore justified (see Judgment 1684, *in re* Forté, under 8) and may fairly be set at 1,200 euros.

Having partially succeeded in his two applications for execution, the complainant is entitled to costs.

DECISION

For the above reasons,

1. The Organization shall pay the complainant 1,200 euros in moral damages and 1,200 euros in costs.
2. His other claims are dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative

EIGHTY-NINTH SESSION

***In re* Vollering (Nos. 18 and 19)** **Judgment No. 1966**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighteenth complaint filed by Mr Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 29 April 1999 and his nineteenth complaint filed on 28 May and corrected on 21 June, the EPO's reply of 15 July to his eighteenth complaint and its reply of 23 September to his nineteenth complaint, the complainant's rejoinders of 14 October and the Organisation's surrejoinders of 17 December 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch citizen born in 1952, is a patent examiner at grade A3 in Directorate-General 1 (DG1) of the European Patent Office, the EPO's secretariat, in The Hague.

Following Judgment 1663 (*in re* Bousquet No. 2, Gourier and Vollering No. 11), the complainant and another staff member, Mr Philippe Gourier, organised a drink for the EPO staff on 16 July 1997 to celebrate the outcome of that judgment. The complainant wanted to invite the entire staff and on the morning of 11 July he drafted an invitation and sent it to the Information

Systems Department (hereinafter "the Helpdesk") along with a request that it be distributed to the whole Office via "Office Vision" (OV), the EPO's internal electronic mail system. In the afternoon, the Helpdesk informed the complainant that it was unable to distribute his invitation via that system because it was outside its authority to do so. It suggested that he try to post his message on "EPOSCOPE", an internal on-screen information system located throughout the Office's premises in The Hague. He chose not to pursue that option. Later that afternoon the complainant handed in a letter to the President of the Office requesting that his invitation be delivered via the OV system to the whole Office, or alternatively just to the EPO staff at The Hague. He told the President that in the event that the invitation was not distributed by 15 July at 4 p.m. he would regard that as implied rejection of his request and his letter should be considered as lodging an internal appeal.

When the complainant's efforts to send the invitation via the OV system had failed, he contacted the internal mail distribution office on the afternoon of 15 July to ask how long it would take to have a printed version of the invitation delivered to EPO staff at The Hague. The person responsible for internal mail distribution told him that from a technical standpoint it could be done before noon the next day. However, later that afternoon the distribution office sent the complainant an e-mail saying that it would be unable to distribute the invitations because it was "not allowed to use the formal [EPO] services for private goals". The complainant received that e-mail early on 16 July and then handed in a letter to the President requesting that his invitations be delivered to the staff during that day. The letter also stated that in the event of his printed invitations not being distributed, he would regard that as implied rejection of his request and his letter should be considered as lodging an internal appeal.

In two letters dated 12 August 1997 the Director of Personnel Development informed the complainant that each of his requests were rejected and that his appeals had been referred to the Appeals Committee for an opinion, under the numbers 59/97 and 60/97. His appeals were heard on 26 June 1998. On 1 July the Committee asked the Administration for further information regarding the procedural rules governing use of the OV system and the internal mail distribution facilities. The Administration replied on 25 September 1998 that there were no written rules regarding the use of the

OV internal electronic mail system, nor were there any local guidelines regarding internal mail distribution; the complainant's requests were without precedent. Nevertheless, it was within the President's discretionary authority to deny the distribution of the complainant's invitation by the Office's systems.

In its report of 25 January 1999 the Appeals Committee recommended, by a majority, the rejection of his appeals. In a letter of 2 March 1999 the Director of Personnel Development informed the complainant that the President of the Office had rejected his appeals. That is the impugned decision.

B. The complainant contends that, since there were no rules or guidelines applicable to his requests, the refusal to distribute his invitation amounted to censorship and should be seen as an abuse of power. Furthermore, Article 30 of the Service Regulations recognises that permanent employees shall have the right to freedom of association so by not delivering his invitation this right was also breached. He provides numerous annexes consisting of both OV e-mails and internal mail which although they are unrelated to the official functions of the Office have nevertheless been distributed through the Office's internal systems. He argues that the content and intent of his invitation did not differ from those; therefore, he has been discriminated against. He claims that the President had "arbitrary motives" in denying his requests. Because he was unable to inform all the staff of his reception he had to throw away more than half of the food due to low attendance.

In each of the present complaints the complainant asks the Tribunal to (1) quash the President's decision of 2 March 1999 and order compensation of 20,000 guilders for the "moral and factual damage" suffered by him because of the refusal to distribute his invitations; (2) condemn the President for abuse of power because he censored the complainant's invitations, thereby abusing his right to freedom of association, and discriminated against him while using arbitrary motives; and order compensation to the complainant of 30,000 guilders for this abuse of power; and (3) order compensation of 10,000 guilders for costs.

In his eighteenth complaint he also asks the Tribunal to condemn the EPO for the bias shown by the majority opinion of the Appeals Committee and the resulting breach of due justice and to order compensation of 5,000 guilders for the moral injury suffered.

In his nineteenth complaint he further asks the Tribunal to condemn the EPO for the bias shown by the majority opinion of the Appeals Committee and/or the Committee's failure "to comply with its procedural rules prescribed by the Service Regulations" and for the resulting breach of due justice, and to award him 10,000 guilders by way of compensation. He also asks that the EPO be ordered to pay him 200 guilders for the loss he has suffered as the result of the Organisation's rendering his invitations "worthless".

C. In its reply to the eighteenth complaint the Organisation asserts that the President's refusal of the complainant's request was not based on a wish to impose censorship but on "the criterion of compliance with the Office's business activities and interests in general". It denies having hindered the complainant; in fact, the Helpdesk had presented him with an alternative which the complainant disregarded. Furthermore, the "Rules of Use" for the OV system clearly state that it "is only to be used for approved EPO business purposes". Circulation of the complainant's invitation would have blocked part of the system for "an entirely private purpose". As there is no "established right" to the circulation of private mail, the EPO has not discriminated against the complainant.

Moreover, the examples that he has provided of private e-mails that have been circulated constitute "more or less disputable exceptions" to the policy of not circulating e-mails that serve commercial or private interests. However, this was not so widespread as to give the complainant an expectation that his e-mail would be circulated as well. In addition, he is neither in the same legal nor factual situation as staff who sent the e-mails he refers to.

The complainant was neither acting as staff representative of an existing staff association nor attempting to create a new staff association, so the allegation of breach of his right to freedom of association is irrelevant.

The right to association under Article 30 relates to staff associations, not private gatherings as is the issue in this case.

In its reply to the nineteenth complaint, the Organisation requests the joinder of the two complaints, arguing that they raise the same issues of fact and of law. In view of the lack of any substantive difference between the complaints the EPO refers the Tribunal to its comprehensive reply to the complainant's eighteenth complaint.

The EPO contends that the complainant has demonstrated "a vexatious and abusive manner of exercising his right to appeal" and therefore, in both complaints, requests the Tribunal to order that he bear his own costs, and if deemed appropriate, the costs of the Organisation.

D. In his rejoinders the complainant admits that the President has discretionary authority to refuse the circulation of certain private mail, but says that in his case this refusal was unjust and not in the interest of the staff. He argues that due to the widespread use of electronic mail the staff has a "binding" expectation that all electronic mail will be delivered provided that it does not contain offensive information. He chose not to use "EPOSCOPE" because of its limited nature. He presses his other pleas.

E. In its surrejoinders the Organisation stresses that "the Office's information circulation facilities were set up exclusively to serve its business interests"; therefore, any non-business use must be limited. There is no "established right" to the circulation of private mail in the Office. It presses its counterclaims.

CONSIDERATIONS

1. The complainant, who has been an employee of the European Patent Office since 1 September 1982, is a patent examiner in Directorate-General 1 (DG1) at The Hague.

2. In Judgment 1663, delivered on 10 July 1997, the Tribunal decided to set aside the EPO's decision of 2 April 1996 regarding the adjustment of salary and to send the cases back to the Organisation for new decisions,

as from 1 July 1992, in favour of the complainants, who included Mr Vollering. When he learnt of the judgment, he decided with a colleague to organise a drink for staff to celebrate what he considered to be a victory over his employer.

3. Consequently on 11 July 1997, he sent an invitation in the form of a note to the Information Systems Department for distribution to all the staff of the EPO through the Office's internal electronic mail system, called "Office Vision" (OV).

The Department refused to comply with the complainant's request and suggested that he post his message on "EPOSCOPE", an internal on-screen information system broadcasting continuous internal information on screens situated in various locations of the Office's premises in The Hague.

On the same day, the complainant wrote to the President of the Office reiterating his request that his invitation be distributed to all the Office's staff (or, failing that, to the staff serving in The Hague) through the internal electronic mail system. In the event that his request was not met, he asked for his letter to be considered as lodging an internal appeal.

In a letter dated 12 August 1997, the Director of Personnel Development informed him that his request could not be met and that his internal appeal would be referred to the Appeals Committee for an opinion under the number 59/97.

4. On 15 July, the complainant also delivered 1,900 printed invitations to the internal mail distribution office at The Hague requesting their distribution to all the staff serving in The Hague. The distribution office refused on the grounds that it was not allowed to use formal Office services for private matters.

On 16 July, the complainant once again wrote to the President renewing his request for the distribution of his invitations to the staff serving in The Hague. In the event that his request was not met, he asked for his letter to be considered as lodging an internal appeal.

By a letter of 12 August, the Director of Personnel Development informed the complainant that his appeal would be referred to the Appeals Committee under the number 60/97.

5. The Appeals Committee reported on 25 January 1999. It recommended, by a majority, the rejection of his appeals numbered 59/97 and 60/97.

On 2 March, the complainant was informed that the President of the Office had decided to follow the majority opinion of the Appeals Committee and had therefore rejected his internal appeals. It is this decision of 2 March 1999 which is challenged in the complaints filed on 29 April and 28 May 1999, respectively.

6. The EPO requests the joinder of the two cases. Since the complaints are identical in fact and in law, they are therefore joined to form the subject of a single judgment.

7. The complainant contends that the censorship exercised against him constitutes abuse of authority. He alleges a violation of freedom of association, and says he was the victim of discrimination and that arbitrary motives were invoked for refusing him the use of the Office's information facilities. He also says that there was breach of his right to have information distributed through the Office's services.

8. The EPO has produced a document dated September 1995 containing the "Rules of Use" of the "Office Vision" electronic mail system which indicates that the system "is only to be used for approved EPO business purposes".

The guidelines for the handling of mail at the EPO, published on 29 August 1994, state that staff should not have private correspondence sent to them at the EPO and that private mail cannot be posted at the Office's expense.

9. However, notwithstanding these rules and guidelines, which clearly indicate that the use of Office facilities in this context should be limited to business purposes, it should be recalled that Judgment 1547 (*in re* Baillet and others), delivered on 11 July 1996, noted that the EPO had "admitted to the Appeals Committee that its consistent practice since 1992 had been to distribute any unsealed unofficial internal mail, whether private or not, save any text containing a personal attack on someone".

10. However, even if this practice could be considered as creating an obligation upon the Office, it should be emphasised that such an obligation could involve limits relating, for example, to the content, nature and purpose of the mail that it is requested to distribute.

11. In the present case, the Appeals Committee rightly found that the scale of the operation and the costs that it could imply for the EPO fully justified the refusal of the complainant's request.

If account is also taken of the wording of the invitation and the purpose of the event to which the staff were invited, which is somewhat provocative towards the EPO, whose defeat it was intended to celebrate, it may be deduced that the EPO was justified in taking the impugned decision and that its reasons for doing so cannot be said to be arbitrary.

12. It follows from the above, and from the dossier that EPO staff members do not enjoy an absolute right to have information or documents of any type distributed through the Office's facilities.

13. On the issue of alleged discrimination against the complainant, the latter does not produce proof that in like conditions and circumstances the facilities which he was refused had been granted to any other staff member of the EPO.

14. The Tribunal finds that there was no breach of freedom of association in the present case.

15. The complaints must therefore fail, although the Tribunal sees no reason to order the complainant to pay costs.

DECISION

For the above reasons,

1. The complaints are dismissed.
2. The EPO's counterclaims are dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT SEYDOU BA JAMES K. HUGESSEN

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Vollering (No. 20)**

Judgment No. 1967

THE ADMINISTRATIVE TRIBUNAL,

Considering the twentieth complaint filed by Mr Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 30 June 1999, the EPO's reply of 23 September, and the complainant's letter of 21 October 1999 by which he waived his right to rejoin;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch citizen born in 1952, is a patent examiner at grade A3 in Directorate-General 1 (DG1) of the European Patent Office, the EPO's secretariat, in The Hague. Facts relevant to the present case are set out under A in Judgment 1663 (*in re* Bousquet No. 2, Gourier and Vollering No. 11) of 10 July 1997, and Judgments 1931 (*in re* Baillet No. 3) and 1932 (*in re* Vollering No. 17) of 3 February 2000.

On 15 February 1996, with a view to settling a salary dispute at the EPO, the President of the Office and staff representatives signed a joint statement agreeing several measures. They formed the subject of a proposal for a compromise settlement which was submitted to the Administrative

Council. By decision CA/D 4/96 of 8 March 1996 the Council approved the measures that had been proposed, which included the payment of a lump sum for the period from 1 July 1992 to 31 December 1995 and the addition of two new steps at the start of each grade on the salary scale.

On 30 November 1998 the President of the Office rejected the complainant's internal appeal No. 33/96 regarding the one-off lump-sum payment. The complainant challenged that decision on 26 February 1999 when he filed his seventeenth complaint with the Tribunal, and the same day lodged a new appeal with the President, claiming that the lump-sum payment was only one part of a "package deal" which the President had not implemented in full. In a letter of 12 April 1999 the Director of Personnel Development informed him that he could not appeal internally against a final decision of the President; such a decision could only be appealed before the Administrative Tribunal. The complainant impugns that letter.

B. The complainant argues that the President of the Office was "bound by his decision to implement the package deal". Payment of the lump sum was an essential part of the "package deal", and in denying him payment of that sum the President is implementing the settlement agreed with the staff representatives in an arbitrary manner.

He moreover deplores the consequence of the implementation of the compromise settlement because the two new steps at the start of each grade are negative steps. He was opposed to the introduction of the steps because "he did not want to take the moral responsibility for the betrayal of his future ... colleagues".

The complainant asks the Tribunal: to declare the President's implementation of the package deal arbitrary, particularly the part relating to the "declaration" which "inherently contains the introduction of two new steps at the beginning of the salary scale for each grade"; and to order that the package deal be annulled or at least to order the annulment of the two new steps. He also seeks damages for the moral injury he has suffered as a result of the "arbitrary implementation of the package deal"; and compensation for costs incurred.

C. In its reply the EPO requests the Tribunal to dismiss the complaint as being irreceivable, superfluous and unfounded. Because it considers that the present complaint represents a serious abuse of process, it asks the Tribunal to exceptionally order the complainant to bear his own costs and those of the Organisation.

On the receivability of the complaint, the Organisation argues that the letter of 12 April 1999 merely informed the complainant that the proper procedure for challenging the President's final decision of 30 November 1998 was to file a complaint with the Administrative Tribunal and the complainant has already availed himself of that means of redress by filing his seventeenth complaint which led to Judgment 1932. Consequently, in the present case, he has not only challenged the same decision for a second time, but he has also filed his complaint out of time. He has used this complaint "to present new claims which he apparently forgot to formulate when challenging for the first time the decision of 30 November 1998". The complaint is, therefore, clearly irreceivable.

On the matter of the two new incremental steps, it states that a decision was taken at the time of the adoption of the compromise settlement to the effect that the new steps would not apply to staff then in service. Therefore, the complainant is not personally affected by their implementation and his complaint is unfounded.

CONSIDERATIONS

1. With a view to resolving a dispute concerning the salary of staff in the European Patent Office, the President of the Office and the staff representatives agreed on the text of a compromise settlement approved by the Administrative Council on 8 March 1996.

Among other measures, the joint statement provided, as regards the past, for the payment of a lump sum and, for the future, the addition of two new steps at the start of each grade in the salary scale. The new steps would only be applicable to new staff.

Staff members wishing to receive the lump-sum payment envisaged as part of the settlement were invited to sign an individual declaration in which they undertook not to pursue any appeal relating to the salary dispute.

2. By a letter of 31 May 1996 to the President, the complainant requested payment of the lump sum without having signed the individual declaration and, in the event that his request was not met, asked that his letter be treated as an internal appeal.

His request was rejected by the Principal Director of Personnel by a letter of 19 July 1996. The President followed the opinion of the Appeals Committee and rejected the internal appeal in a letter of 30 November 1998.

3. By a letter of 26 February 1999, the complainant acknowledged receipt of the decision of 30 November refusing him payment of the lump sum. He also requested the restoration of the situation that prevailed before 1996 or, failing that, the removal of the "negative" steps from the salary scale as from 1996. In the event that his request was not met, he asked that his letter be treated as an internal appeal.

On the same day he filed a complaint with the Tribunal against the decision of 30 November 1998.

In a letter dated 12 April 1999, the Director of Personnel Development replied to the complainant that, as the filing of an internal appeal against the President's final decision was not allowed, the only course open to him was to refer the matter to the Tribunal.

4. The complainant indicates that the impugned decision is the one contained in that letter of 12 April 1999. He asks the Tribunal: to declare the President's implementation of the package deal arbitrary, particularly the part relating to the "declaration" which "contains the introduction of two new steps at the beginning of the salary scale for each grade"; and to order that the package deal be annulled, or at least to order the annulment of the two new steps. He also seeks compensation for moral injury and compensation for costs incurred.

5. The Organisation contends that the complaint is irreceivable on the grounds that, in particular, the letter of 12 April 1999 which is challenged by the complainant only contained information and did not constitute a decision which could be challenged before the Tribunal. It argues that the decision which in fact the complainant is impugning is the decision

of 30 November 1998 rejecting his earlier internal appeal and that the present complaint, which was filed on 30 June 1999, is therefore time-barred.

6. If the impugned decision is the one contained in the letter of 12 April 1999, as the complainant suggests in the complaint form, the complaint is receivable. That letter, however, which simply informed the complainant that an internal appeal was not allowed and that the only recourse open to him was to refer the matter to the Tribunal, cannot be interpreted as a decision within the meaning given to that term by the Tribunal (see Judgment 1203 *in re* Hosman and others, under 2).

7. If the impugned decision is in fact the decision of 30 November 1998 rejecting the complainant's first internal appeal, the Tribunal has already dismissed a complaint against that decision in Judgment 1932 and the complainant cannot challenge *res judicata*.

8. In his claims the complainant requests that the addition of two new steps at the beginning of each grade in the salary scale be annulled. However, since these provisions do not apply to him he has no cause of action.

9. The complaint must therefore fail. The Tribunal, however, finds no reason to uphold the EPO's claim that the complainant should pay costs.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The EPO's counterclaim is dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT SEYDOU BA JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

***In re* Concannon**

Judgment No. 1968

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Brian Stephen Concannon against the European Patent Organisation (EPO) on 29 July 1999, the EPO's reply of 16 November 1999, including the observations made by Mr C. at the Tribunal's request, the complainant's rejoinder of 18 January 2000 and the Organisation's surrejoinder of 31 March 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is of British and Irish nationality and was born in 1955, joined the European Patent Office, the secretariat of the EPO, in 1989. He was assigned to the Office's Directorate-General 2 in Munich and classified as an examiner at grade A2 based on three years and seven months of relevant experience. He was promoted to grade A3 as of 1 November 1993, when he had obtained eight years experience.

Promotion in the EPO is governed by Article 49 of the Service Regulations for Permanent Employees of the European Patent Office as well as periodic instructions issued by the President of the Office to the chairmen of the promotion boards. The pertinent instructions for promotion from A3 to A4 at the material time set the following criteria for those eligible to be considered for the earliest promotion: an "outstanding" record of performance during three normal reporting periods, between 12-15 years of reckonable experience and a minimum age of between 37-40.

The EPO's Gazette 22/97 of 8 December 1997 announced, among others, the promotion of Mr C., the President's personal assistant, from grade A3 to A4. Although at the time he was promoted Mr C. had consistent "outstanding" performance appraisals, these covered a shorter time period than the requisite "3 normal reporting periods". In addition, he had only nine years of reckonable experience and was 34 years old. The Promotion Board did not include him on the list it had sent to the President. He was, however, carrying out the duties of an A5 post while at grade A3. On 23 February 1998, the complainant lodged an internal appeal against the President's decision to promote Mr C. On 6 March nearly 200 of his colleagues lodged similar appeals.

Having received no information on the status of his appeal for more than one year, the complainant wrote to the Chairman of the Appeals Committee on 8 March 1999 to inquire when either a hearing or a recommendation could be expected. The Chairman replied on 9 March that the Appeals Committee was waiting for the position paper of the Administration before it could hear the appeal and that he had forwarded the complainant's letter to the Administration for further action. On 19 March the Director of Personnel Development wrote to the complainant that, owing to a backlog of appeals, he was unable to predict when the Administration's position paper would be ready.

When no further action seemed forthcoming, the complainant filed his complaint with the Tribunal on 29 July 1999.

B. The complainant argues that he is justified in filing his complaint with the Tribunal based on the length of the delay in handling his appeal along with the fact that the Administration was unable to tell him when it might submit its position paper.

On the merits he pleads a procedural flaw. The decision to promote Mr C., in his view, was taken in breach of Article 49 of the Service

Regulations and the President's instructions on promotion. He contends that this adversely affects him. By promoting a permanent employee who does not meet the minimum criteria, all other permanent employees are harmed because it is a decision "based on unknown criteria different from those applicable to the complainant and the rest of the defendant's staff". The President has breached the principle of equal treatment by not abiding by the criteria for promotion that he has set for the rest of the staff. The promotion also breaches the principle of objectivity which can only be maintained if the proper procedure is respected. In this case it means that the "Promotion Board shall draw up and forward to the President a list presented in order of merit of employees who are eligible for promotion based on a comparison of their merits together with a reasoned report".

The complainant requests that the decision to promote Mr C. to grade A4 as of 1 December 1997 be set aside or that the EPO be ordered to pay him 3,500 German marks (or the euro equivalent) in moral damages. He also requests 2,500 marks (or the euro equivalent) in costs.

C. In its reply the EPO objects to the receivability of the complaint because the complainant has failed to exhaust all internal means of redress. Although there has been a delay in dealing with the appeal, the complainant has not shown "that the internal appeal proceedings are unlikely to end within a reasonable time" as required by the Tribunal in Judgment 1829 (*in re* Müller-Engelmann). It also contends that the complaint is irreceivable because the complainant cannot show that he was adversely affected by the decision to promote Mr C., particularly given the fact that the complainant did not satisfy the objective criteria for promotion in 1997.

Subsidiarily on the merits, the Organisation denies that the decision to promote Mr C. was procedurally flawed. His name was put forward to the Promotion Board for exceptional consideration by the President, his immediate supervisor, on the basis that he had the nine years of professional experience required by an A4 job description. The Board subsequently "limited its recommendations to those cases which met the 'usual' requirements, and abstained from making any recommendations on the 'special' cases". In Mr C.'s case it simply stated that it was "not in a position to recommend a promotion", and this does not constitute a procedural flaw. Nor was the principle of equal treatment breached as the complainant and Mr C. were not in the same position in law.

D. In his rejoinder the complainant contends that the President's decision to promote Mr C. despite the fact that the Promotion Board did not recommend him for promotion shows an abuse of power. He reiterates that the promotion procedure was flawed, placing particular emphasis on "the out-of-sequence staff report" written by the President just days before he submitted Mr C.'s name to the Promotion Board.

E. In its surrejoinder the Organisation attaches the Appeals Committee's report of 31 January 2000. In this report the Committee unanimously finds in favour of allowing the appeal but the EPO emphasises that the Committee had concluded, contrary to the complainant's arguments, that there was no error in relying on the out-of-sequence staff report. It presses its arguments that the promotion of Mr C. was not tainted by abuse of power or a procedural flaw.

CONSIDERATIONS

1. The complainant appeals against the administrative decision of the President of his employer, the European Patent Office, promoting the complainant's colleague Mr C. to grade A4 with effect from 1 December 1997. Prior to that promotion, Mr C., like the complainant, was at grade A3. In February and March 1998, the complainant and some two hundred of his colleagues filed internal appeals with the President in a timely manner. The appeals were referred by the President to the Appeals Committee in April 1998.

2. In March 1999, the complainant inquired of the Chairman of the Appeals Committee as to when the Committee might be prepared to make its recommendations. He received a reply to the effect that the Committee had not yet received the position paper of the Administration and the complete file. On 19 March 1999 the Director of Personnel Development wrote to the complainant stating that there was a serious backlog in the processing of internal appeals but that his service would endeavour to

produce the Administration's position paper as soon as possible. The present complaint was filed on 29 July 1999; the relief sought is either the setting aside of the decision to promote Mr C. or moral damages.

Receivability

3. The defendant claims that the complaint is irreceivable on two grounds: first that the complainant has not exhausted his internal means of redress and second that the decision to promote a colleague does not adversely affect the complainant.

4. The Tribunal holds the complaint to be receivable. The circumstances of the present case are such that it would be unreasonable to expect the complainant to have waited any longer for the Administration to get around to dealing with his internal appeal. In Judgment 1829 the Tribunal recently summarised the state of its case law as follows:

> "6. ... The Tribunal's case law has it that where the pursuit of the internal remedies is unreasonably delayed the requirement of Article VII(1) will have been met if, though doing everything that can be expected to get the matter concluded, the complainant can show that the internal appeal proceedings are unlikely to end within a reasonable time: see Judgments 1243 (*in re* Birendar Singh No. 2) under 16, 1404 (*in re* Rwegellera) under 8, 1433 (*in re* McLean) under 4 and 6, 1486 (*in re* Wassef No. 8) under 11 and 13, 1534 (*in re* Wassef No. 14) under 3 and 1684 (*in re* Forte) under 3.
>
> 7. The complainant's internal appeal was received by the Organisation on 16 April 1997. Her statement is lengthy and has 24 annexes. Less than a month later the Vice-President completed his initial assessment of her claims and referred the matter to the Appeals Committee. She filed this complaint just over three months later.
>
> 8. The Tribunal holds that at the date of filing the present complaint the internal appeal process had not been unreasonably delayed and there was no indication that it was unlikely to come to an end within a reasonable time. That part too of the complaint is therefore irreceivable."

5. The Organisation argues that since in fact the complete file and the Administration's position paper were sent to the Appeals Committee on 12 October 1999, it is now established that the internal appeal is going forward and that the complainant has not accordingly exhausted his internal means of redress. The Tribunal disagrees. Receivability falls to be determined at the time that a complaint is filed, not at some later date. As at

29 July 1999 the complainant had done all that could be reasonably expected of him. He had filed his appeal in time. Approximately a year later he wrote to enquire about its progress and had been informed that the Administration had done nothing but would move forward as soon as possible. He filed his complaint just over four months later having heard nothing further from the Administration. At that time almost twenty months had elapsed since the original challenged decision had been published. The Administration's plea that it had a heavy backlog of internal appeals to deal with may be a reason for the inordinate delay, but it is not an excuse. As at 29 July 1999, it was simply not reasonable to expect the complainant to wait any longer to see even the beginning of the end of the internal appeal procedure. If the Organisation was overloaded with internal appeals, it was for it to remedy the situation rather than expect the complainant to bear the consequences.

6. The second ground of alleged irreceivability is equally untenable. As will appear below, the gravamen of the complaint is that Mr C. did not meet the published criteria for promotion from A3 to A4. To this the Administration pleads that it was entitled to treat Mr C. as an exceptional case. If that is so, then it is nothing to the point that the complainant also does not meet all the criteria for promotion from A3 to A4 since he too can claim that he has a right to be considered as an exceptional case and was therefore adversely affected by the impugned decision. Both were at the same grade, in the same career stream, and both are entitled to expect that promotions will only be made fairly and objectively, based on merit and in accordance with law.

Merits

7. Promotion for staff members of the EPO is governed by Article 49 of the Service Regulations, the relevant portions being paragraphs 4, 7 and 10 which read as follows:

> "(4) Where the appointing authority is the President of the Office he shall take his decision after consulting a Promotion Board."
>
> "(7) Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them. The

> employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and at least two years service in their grade in the Office."
>
> "(10) The President of the Office shall forward to the Promotion Board the names of all permanent employees who possess the necessary qualifications referred to in paragraphs 7 and 9 above.
>
> The Board shall examine the personal file of all permanent employees satisfying the relevant requirements and may, if it so decides, interview any permanent employee under consideration.
>
> The Board shall draw up and forward to the President of the Office for his decision a list, presented in order of merit, of permanent employees who are eligible for promotion, based on a comparison of their merits, together with a reasoned report."

8. Pursuant to this Article, the President sent instructions to the Promotion Board together with relevant information relating to all the staff members who might be eligible for promotion. The instructions issued in December 1996 contained the following paragraphs with regard to the general criteria normally applicable to promotion from A3 to A4:

> "III. Promotions from A3 to A4
>
> Individuals may be considered as eligible for promotion who meet the following criteria:
>
> - Individuals with an 'outstanding' record of performance between 12 and 15 years', those with a 'very good' record of performance between 15 and 18 years' and those with an unqualified 'good' record of performance with 19-23 years' reckonable experience. Entry into each of these ranges of experience will also normally depend on the attainment of certain minimum ages of between 37-40 for those considered 'excellent', 40-44 for the 'very goods' and 44-48 for the 'goods'.
> - Candidates who have reached the age of 50 and who have at least 3 years' service with the EPO may be considered eligible for promotion if this is also supported by the individual's merit."
> - The Promotion Board may, if appropriate, draw my attention to special cases, even where the usual requirements are not fully met."

9. Both the complainant's name and that of Mr C. appeared on the lists of eligible A3 employees which were attached to these instructions. However, neither met the "normal" or "usual" requirements established by the President's instructions to the Promotion Board quoted above.

10. In particular it is common ground that Mr C. did not meet either the requirements for age or years of reckonable service, set out in these instructions, for the promotion that he received.

11. It is equally clear, however, that the Organisation is right when it pleads as it does that an earlier decision of the Administrative Council together with both the text of Article 49 and the President's instructions to the Promotion Board, make it plain that, in exceptional circumstances some persons may be promoted who do not meet the normal criteria established. It is for this reason that the instructions themselves invite the Promotion Board to submit any such "special cases" to the President for his consideration.

12. Mr C.'s posting was to a position where he was required to work in close personal proximity to the President in the latter's office and under his direct supervision. At the relevant time, he had nine years of reckonable experience with the Organisation. He was clearly an outstanding employee and all his staff reports had been highly laudatory. There can be no doubt that the President had formed the view, prior to any consultation process involving the Promotion Board, that Mr C. should be promoted to grade A4. He wrote on 11 April 1997 to the Promotion Board drawing the Board's attention to Mr C.'s case and suggesting that he be treated as a "special case".

13. The Board declined to recommend the promotion of Mr C. stating that it was not in a position to do so. Notwithstanding, the President made the promotion on his own authority.

14. The complainant argues that the decision to promote Mr C. was procedurally flawed and did not meet the requirements of objectivity and fairness which are an integral part of the merit principle in international civil service law.

15. The Tribunal agrees. While it is clear that the role of the Promotion Board is essentially consultative and that the Organisation is not obliged to make promotions in accordance with its recommendations, it is equally

clear that the Organisation has formally committed itself only to making promotions which have been approved and recommended by the Board. The third paragraph of Article 49(10), quoted above, clearly qualifies the discretion given to the President by Article 49(4) when it states that the Board shall draw up and send to the President "for his decision" a list of eligible candidates. If there were any doubt on the subject, it would be resolved by the following passage which appears in the President's instructions to the Board:

> "I invite you to present your recommendations in lists, established in order of merit within each grade. The lists must be accompanied by a reasoned report. I will then decide on the individual promotions by making a selection from the candidates you suggest ..." (emphasis added)

16. In Judgment 1600 (*in re* Blimetsrieder and others), a case whose facts are very similar to the present one, the Tribunal said:

> "Article 49 of the Service Regulations and the guidelines laid down by the President for the Promotion Board establish a promotion procedure of which the fairness and impartiality are ensured as far as possible by the presence of staff representatives on the Board. If the Board is denied information it seeks or if a decision to promote is taken against the Board's advice and on the basis of considerations other than ability and the record of performance, as prescribed in Article 49(7) of the Service Regulations, then fairness and impartiality can no longer be ensured."

17. In the present case, the President sought, but failed to obtain, the Promotion Board's approval for his proposal to promote Mr C. While the President clearly has a residual discretion not to make promotions which the Board recommends, he may only make promotions in accordance with the Board's recommendations. Since the Board declined to recommend Mr C. for promotion, his promotion was irregular.

18. Furthermore, as the appointing authority, it was clearly inappropriate for the President, having urged the Promotion Board to treat Mr C. as a special case, to then disregard the Board's refusal to recommend the promotion. The decision cannot stand.

19. The complainant is entitled to his costs which the Tribunal assesses in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The complainant is entitled to 1,000 euros in costs.
3. His other claims are dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

***In re* Wacker** **Judgment No. 1969**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Karl-Heinz Wacker against the European Patent Organisation (EPO) on 2 September 1999 and corrected on 1 November 1999, the EPO's reply of 24 January 2000, the complainant's rejoinder of 23 February, and the Organisation's surrejoinder of 30 March 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German national born in 1947, joined the European Patent Office, the secretariat of the EPO, in 1984. He was assigned to the Office's Directorate-General 1 in The Hague, the Netherlands.

Article 60(2) of the EPO Service Regulations reads:

> the home shall be the place with which [the employee] has the closest connection outside the country in which he is permanently employed. This shall be determined when the employee takes up duties, taking into account the place of residence of the employee's family, where he was brought up and any place where he possesses property

> Any review of this decision may take place only after a special decision by the President of the Office upon a reasoned request by the permanent employee."

At the time the complainant took up his duties, Schwäbisch Gmünd, Germany, was determined as being his home within the meaning of that article. This was based on the fact that he grew up and studied there, had been working there before joining the EPO, and that his mother and other members of his family lived there.

Since 1979 he has been married to a Philippine national. His wife's family lives in Zamboanga City in the Philippines. He and his wife have spent most of their family holidays there and they have purchased a home there for when he retires.

By a letter dated 2 March 1998 the complainant requested that his place of home leave be changed from Schwäbisch Gmünd in Germany to Zamboanga City in the Philippines. He stated that his mother and one sister had recently passed away, most of his other relatives no longer live in Schwäbisch Gmünd, and that he has closer personal relationships with members of his wife's family than with his own. On 23 March the Director of Personnel denied his request. On 18 June 1998 the complainant appealed to the President of the Office against the rejection of his request. On 12 April 1999 the Appeals Committee recommended dismissing his appeal as unfounded and on 5 May 1999 the Director of Personnel Development informed the complainant that the President had rejected his appeal. That is the impugned decision.

B. The complainant argues that the EPO "has not duly considered essential facts" in reviewing his request. He points out that the crucial issue is whether "the personal circumstances of the complainant constitute a radical change concerning the place with which he has the closest connection". The only relative he has left in Schwäbisch Gmünd is a much older half-brother and he contends that his "family bonds ... and spiritual, emotional and material ties" are much stronger with his wife's whole family in the Philippines than with any remaining family he has in Germany. He says that although in similar cases the Tribunal has considered these links, which are difficult to substantiate and cannot be formally proved, the EPO has failed to consider them and has applied a strict and rigid interpretation to the notion of "home".

He requests that the President's decision denying him the change of his place of home leave to the Philippines be quashed.

C. In its reply the Organisation stresses that review of place of home leave is "an exceptional measure" which under the terms of Article 60(2) "may take place only after a special decision by the President of the Office upon a reasoned request by the permanent employee". In this case, the President's decision shows no procedural or formal flaw such as would lead the Tribunal to quash it.

The EPO argues that due account was taken of the changes in the complainant's situation, and although his ties to Germany may have been weakened with the death of his mother it believes these ties to be "still stronger" than those he may have built up with his in-laws in the Philippines. In addition, the complainant has failed to provide evidence that essential facts were overlooked.

Furthermore, it points out that the purpose of home leave for permanent employees is to maintain ties with their home country while they are still serving the Organisation and not to prepare them for retirement.

D. In his rejoinder the complainant disputes the Organisation's representation of his submissions and presses his argument that the President has "exercised his discretionary power without giving due weight to the facts". In assessing whether there has been a "radical change" in circumstances since the time he joined the EPO one must look at more than just what circumstances prevailed at the time he joined the Office and consider what circumstances prevailed at the time he made his request to change his place of home leave.

E. In its surrejoinder the EPO contends that it has weighed all essential facts and arguments but that it was nonetheless justified in rejecting the complainant's request.

CONSIDERATIONS

1. In a request notified to the European Patent Office on 2 March 1998 the complainant asked that in accordance with the provisions of Article 60(2) of the Service Regulations his home for the purposes of home leave be changed from Schwäbisch Gmünd in Germany to Zamboanga City in the Philippines, following changes that had taken place in his family circumstances.

2. By a reply dated 23 March 1998 the Director of the Personnel Department informed the complainant that at the time he joined the Office it was decided that Schwäbisch Gmünd was his home within the meaning of Article 60. He was born and grew up there, studied and was living there at the time of recruitment. The Director recognised that the death of the complainant's mother, in 1997, had reduced his ties with Germany and that his marriage had created links with the Philippines. Nevertheless, he did not allow his request.

3. The complainant appealed to the President of the Office and in the course of the internal appeals procedure submitted further facts in support of his request.

4. The Appeals Committee, in its report dated 12 April 1999, said that the "special decision" of the President allowed for under Article 60(2) is a discretionary one. It is clear that the Committee reviewed all the essential facts and none had been overlooked. It had taken account of the factors mentioned in Article 60(2) and given due consideration to the fact

that the complainant's ties with his family and Germany may have become less close, and that he had bought property in Zamboanga City, where his wife's family lived, with a view to retiring there. It stated that there had been no mistake in law and unanimously recommended that the appeal be dismissed.

5. By a letter dated 5 May 1999 the President in accordance with the unanimous opinion of the Committee rejected his appeal. That is the decision impugned.

6. The complainant claims that the Administration, in assessing whether there had been a radical change in his personal circumstances, did not duly consider essential facts. It had applied a strict and rigid interpretation of "home". It had also failed to give any weight to his submission that the "spiritual and psychological" links he had with the Philippines were stronger than those he had with Germany. That aspect was not even considered. He submitted that the assessment that his personal circumstances did not qualify as a radical change was an erroneous conclusion resulting from not giving the proper weight to the facts.

7. Since the decision of the President under Article 60(2) is a discretionary decision (see Judgment 525, *in re* Hakin under 4) the Tribunal will quash such a decision only if it was taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

8. If none of those grounds is established the Tribunal may not substitute its view for that of the President. The ground put forward by the complainant is that essential facts were overlooked in the sense that proper weight was not given to the facts, leading to an erroneous conclusion. This is tantamount to saying that the President would have come to a different conclusion on the relevant facts.

9. There is no evidence to show that any fact was overlooked. All the points put forward by the complainant were considered. The impugned decision was based on a consideration of all the facts. A review of a decision under Article 60(2) is an exceptional measure (Judgment 525 under 3). It is not possible to say that clearly mistaken conclusions were drawn from the evidence. After taking everything into account, the President took a different view to the one held by the complainant in his submissions. It follows that there are no grounds for setting aside the decision and the complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

EIGHTY-NINTH SESSION

***In re* White** **Judgment No. 1970**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Michael Robert White against the International Fund for Agricultural Development (IFAD) on 30 March 1999 and corrected on 24 April, IFAD's reply of 19 August, the complainant's rejoinder of 25 October and the Fund's surrejoinder of 23 December 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a British citizen born in 1937, was employed by IFAD under a short-term contract as a précis-writer from 25 to 27 January 1995 at a session of IFAD's Governing Council. The Fund met the cost of his round trip from London to Rome.

His terms of appointment were partly governed by the *Agreement concerning conditions of employment of short-term translators, revisers, editors and précis-writers* concluded between the United Nations'

Consultative Committee on Administrative Questions (CCAQ) and the *Association internationale des traducteurs de conférence* (AITC) referred to below as the CCAQ/AITC Agreement. His appointment was also governed by IFAD's Terms and Conditions of Service for short-term translators, a document that was appended to his contract.

In mid-March the complainant sent a fax to IFAD asking to be paid for his January contract. The sum of £757.62 sterling was paid into his bank account on 21 March. He wrote to IFAD on 10 April requesting a breakdown of the payment. On 12 April the Fund sent him a salary payment form showing how it had worked out the amount paid and what exchange rate it had used.

On 15 May he wrote to the Fund contesting: the exchange rate IFAD had applied; the way it had calculated his overtime; and the amounts it had reimbursed him for terminal expenses and a compulsory medical certificate obtained before he left London. On 24 July the Controller's Office informed him that IFAD's figures were correct and that no additional payments were due. The complainant sent a letter to the President of IFAD on 21 August asking for a review of that decision. Having received no reply, he filed an internal appeal on 20 October. He addressed it to the Chairperson of the Joint Appeals Board and sent it via the Director of the Personnel Division.

In a letter of 21 December 1995 the Director of the Division informed the complainant that the Board had considered that the matter should go first to the Personnel Division for review. He added that there were no grounds for altering the exchange rate, but, with regard to the other issues, IFAD would exceptionally agree to pay him the full amount incurred in obtaining his medical certificate, would correct his overtime payment and revise the amount due to him for terminal expenses provided he could produce receipts. In a reply of 27 January 1996 the complainant accepted the Fund's proposal, and accordingly withdrew part of his appeal. However, he maintained the part relating to the exchange rate and terminal expenses.

The complainant did not receive the extra payments from IFAD and is challenging the implied rejection of his appeal of 20 October 1995.

B. The complainant submits that his complaint is receivable. He filed it in the absence of a final decision from the Administration because, in spite of his efforts, there appeared to be no prospect of his obtaining an opinion from the Appeals Board within a reasonable time. He deduces from the letter of 21 December 1995 that the Board had received his appeal, but he doubts whether the matter was taken further. In spite of the partial settlement agreed to by IFAD he did not receive the additional sums promised. He consequently wrote to the Director of Personnel on 13 May 1996, also enclosing a letter addressed to the Chairperson of the Joint Appeals Board. In that letter to the Board, he said that since he had not received the expected payments from IFAD, the withdrawal of two grounds of his appeal was null and void and that he was maintaining his original appeal in its entirety. He also asked to be informed about the status of his internal appeal. The complainant wishes the Tribunal to regard his appeal as an "integral part" of his complaint.

He states that the Fund failed to observe certain terms of his appointment. He takes issue with the fact that he was paid late – 53 days after the end of his contract – and says that payment for similar contracts in the UN system is normally made at the end of the contract period or soon afterwards. Moreover, he lost out financially as a result of the exchange rate applied by IFAD. It should have applied the rate of exchange which was in force at the time of his contract – £0.64 to the United States dollar – instead of the lower rate of £0.63 to the dollar in force in March when he was paid.

He maintains the claims he made for additional payments in his earlier correspondence with IFAD. It was not specified in his contract that IFAD was applying a ceiling to the payment for his medical certificate and so he is claiming the full amount of £65, equal to 103.17 dollars, instead of the 48.78 dollars the Fund has paid him. His overtime payment was calculated on his base salary only and should have included the post adjustment component. As for his terminal expenses he received 68 dollars instead of the flat rate of 108 dollars applied throughout the United Nations system.

(1) He wants the Tribunal to rule that he should have received:

(a) remuneration (base salary plus post adjustment) converted into pounds sterling at the exchange rate applicable in January 1995;

- (b) overtime payment calculated on the basis of salary plus the post adjustment component;
- (c) reimbursement of the full cost of obtaining his medical certificate;
- (d) terminal expenses calculated at the flat rate paid in the UN common system.

(2) Using, where needed, the United Nations operational exchange rate applicable in January 1995, he wants IFAD to:

- (a) recalculate his pay on the basis mentioned above;
- (b) recalculate the payment due to him for overtime, on the basis of salary plus post adjustment as stipulated in the CCAQ/AITC Agreement;
- (c) calculate the difference between the full cost of the medical certificate and the amount he was actually paid;
- (d) calculate the difference between the amount that he was paid in terminal expenses and that which he should have received under existing arrangements applicable in the United Nations common system (i.e. $108.00).

(3) On the basis of the mode of calculation referred to in 1 (a) to (d) above, he wants IFAD to:

- (a) pay him in pounds sterling the extra amounts due, plus interest at 8 per cent a year reckoned from January 1995 to the date of settlement of this claim;
- (b) pay him £2,000 in "pecuniary damages";
- (c) pay him photocopying, postage and stationery costs.

C. In its reply the defendant organisation contests the receivability of the complaint. Since the filing of the complaint it has endeavoured to settle the matter amicably and made the complainant an offer in good faith, which he refused. As it offered him a sum in excess of the total amount in dispute, IFAD calls into question the complainant's motives in pressing his claims and asserts that the complaint constitutes an abuse of process.

Furthermore, it contends that the complaint is time-barred and the complainant has not exhausted his internal remedies. As IFAD was hoping for an amicable settlement, no panel had been constituted for the Appeals Board. It says it has no record of any effort made by the complainant to press his case before the Board: the last notification it received from him was his letter dated 27 January 1996 maintaining part of his internal appeal. It points out that it does not have any knowledge of the two letters dated 13 May which the complainant claims to have sent to the Director of Personnel and to the Chairperson of the Joint Appeals Board. The letters were never received by the Fund and the complainant has not supplied any proof that they were written or posted.

On the merits, IFAD points out that according to the terms and conditions of service which the complainant agreed to when he signed his contract, the exchange rate applicable to his salary is that "in force on the date payment is made". It processed the payment on 16 February 1995, approximately two weeks after the end of his contract and applied the United Nations operational rate which was in effect from 1 February until 30 April 1995. The delay in processing his payment therefore had no impact on the exchange rate to be applied and is of no relevance.

As for his medical certificate and overtime payment, they are no longer in dispute as IFAD has agreed to pay the amounts claimed by the complainant, although due to an administrative oversight the sums have not yet been paid. Regarding his terminal expenses it observes that, contrary to the complainant's assertions, the CCAQ/AITC Agreement provides that each organisation shall apply its own travel rules to short-term translators, and the terms and conditions annexed to his contract specified that he could claim a maximum of 18 dollars each way. Nevertheless, IFAD had allowed him a higher rate of 68 dollars which was that applied to regular staff. Moreover, although it was prepared to waive that ceiling in the complainant's case he has steadfastly refused to produce the receipts requested by IFAD.

The Fund concludes that the complainant has put forward no grounds for his claim to "pecuniary damages", and that he should not be awarded costs. In view of the frivolous nature of the case it asks for an award of costs against the complainant.

D. In his rejoinder the complainant presses his pleas. He says he cannot be blamed for failing to exhaust the internal means of redress as the Director of Personnel in office at the time in question deliberately chose not to place the letters of 13 May 1996 on file and did not refer the matter to the Appeals Board, with the effect that no panel was constituted to hear his case.

He considers that his complaint is by no means frivolous. Although the sums he sought payment of were small, he believes that the principles at issue are important and that they have not been addressed by offers of additional amounts. IFAD has not admitted that it was in the wrong. Moreover, it has failed to make the expected payments and it is clear that in introducing a lower level of payment for terminal expenses it was breaching the terms of the CCAQ/AITC Agreement.

E. In its surrejoinder the Fund rebuts the complainant's new argument that its former Director of Personnel "engaged in acts of bad faith" or misled him as to the status of his internal appeal. The complainant has adduced no proof to support his allegations. The Fund produces a statement from the official concerned denying the allegations made by the complainant. It also produces two memoranda, one from the Chairperson of the Joint Appeals Board and one from the Secretary of the Board then in office, which show that both officials were aware of the complainant's appeal at the time and had hoped that the matter could be solved by the Personnel Division to avoid litigation. The complainant is bringing late accusations against its former Director of Personnel purely to establish grounds for his claim to "pecuniary damages" by which it assumes the complainant means 'punitive' or 'moral' damages.

The Fund adds that after further investigation it came to light that the complainant had indeed not received his terminal expenses in 1995 at the rate then paid to regular staff and IFAD agrees that he was entitled to 108 dollars, as he claims. It withdraws its pleadings on that issue and reinstates an offer which it made previously to pay him the extra 40 dollars with interest. It also withdraws its plea for costs against the complainant and reinstates its offer to pay him reasonable costs in connection with this case.

CONSIDERATIONS

1. The complainant had a short-term contract as a précis writer from 25 to 27 January 1995 with IFAD and is contesting certain aspects of the payment he received for that contract. He filed his complaint with the Tribunal on the grounds that no opinion had been obtained from the Joint Appeals Board within a reasonable time.

In a letter to IFAD of 15 May 1995 the complainant had questioned why he was not paid until eight weeks after his contract ended and objected to: (1) the dollar/sterling rate of exchange that the Fund used to calculate his pay, inasmuch as it applied the rate valid in March 1995 instead of the slightly higher rate in force at the end of January; (2) the amount IFAD reimbursed him for the cost of obtaining a medical certificate as it cost him £65 (103.17 dollars) in medical expenses whereas he was only reimbursed 48.78 dollars; (3) the way IFAD calculated his overtime pay as it failed to take the post adjustment element into account; and (4) the amount it reimbursed him for terminal expenses – inasmuch as he was expecting the sum of 108 dollars, but IFAD only paid him 68 dollars.

He is now claiming rectification of payment on those four counts in accordance with his submissions, plus interest at 8 per cent a year together with "pecuniary damages" in the amount of £2,000 and a sum for costs.

2. Citing the case law, the Fund acknowledges that a complainant may go directly to the Tribunal if there is no prospect of obtaining a decision following an internal appeal procedure within a reasonable period (Judgment 408 *in re* García and Márquez) but adds that this is conditional

on the complainant doing all that he can to obtain such a decision (Judgment 1243 *in re* Singh No. 2 and Judgment 1433 *in re* McLean).

3. Prior to filing its reply, the Fund contacted the complainant by e-mail on 12 August 1999, apologising for non-payment of the items mentioned in the letter of 21 December 1995 from the previous Director of the Personnel Division: the payment had been authorised but the authorisation never reached the Controller's Office. It offered to pay him: 38.25 dollars as the difference still due to him after recalculating his overtime pay so as to include the post adjustment component; and £34.27 as the difference due for the fees he incurred in obtaining the medical certificate. It also offered him 40 dollars in settlement of his claim for terminal expenses together with 100 dollars to make up for the loss brought about by the exchange rate applied and to cover interest due on the above amounts as well as costs which he may have incurred in bringing his case to the Tribunal.

4. In an e-mail of 13 August 1999 the complainant said that the settlement did not come close to addressing "the points of principle" raised in his complaint and that he would prefer to wait for a ruling from the Tribunal.

5. The Director of the Personnel Division replied by e-mail on 18 August 1999. She said that she could not understand why he had refused a settlement that exceeded the aggregate amount at issue for the four items he was contesting. She added that since IFAD did not dispute his claims relating to overtime and medical fees, it would pay him the amounts it had proposed for those two items with 8 per cent interest per annum from March 1995 to date. The offer of a lump sum of 140 dollars in respect of the other two items was withdrawn.

6. The Fund filed its reply on 19 August 1999 acknowledging that it would settle payment for the two items that were no longer in dispute and that it was awaiting the complainant's banking instructions. As to the remainder, it claims the complaint is irreceivable as he failed to pursue his appeal within a reasonable time.

7. In its surrejoinder the Fund conceded that the complainant was entitled to 108 dollars in terminal expenses and reiterated its offer to pay the extra 40 dollars due plus reasonable interest. It withdrew its counterclaim for costs and offered to pay the complainant reasonable costs.

8. It is apparent that the complainant did not take the necessary steps to get a final decision through the internal appeals process. Although he received no reply to his letter of 13 May 1996 he did not make any further enquiry. If he had done so, it would have become apparent that his letter of 13 May 1996 had not been received by the Board. He did nothing to press his appeal and waited about three years before filing his complaint with the Tribunal on 30 March 1999.

9. A complainant cannot sit back and do nothing when an appeal is lodged. He must pursue the appeal diligently. Only then can he claim that delay is unreasonable. In the present case, the complainant failed to exhaust the means of internal appeal because he did not pursue his appeal diligently; therefore, he does not qualify to bring a direct appeal to the Tribunal.

10. However, since the Fund acknowledges that it will pay the complainant the sum of 38.25 dollars as the difference due after recalculating his overtime rate so as to include the post adjustment component, and £34.25 sterling as the difference due to him in medical fees (with interest at 8 per cent per annum on both those sums from March 1995) and 40 dollars as the difference due to him in terminal expenses (as well as reasonable interest – which the Tribunal fixes at 8 per cent per annum), the Tribunal will order payment of the above sums with interest, as provided, from 1 March 1995 to date of payment.

11. The Fund has agreed to pay reasonable costs incurred by the complainant which the Tribunal sets at £200 sterling.

12. All other claims must be dismissed.

13. The complainant alleges in his rejoinder that the previous Director of the Personnel Division of the Fund made the letter he had sent him on 13 May 1996 "disappear". The Tribunal deplores that allegation of bad faith, made without any supporting evidence.

DECISION

For the above reasons,

1. The Fund will pay to the complainant the sums set out in paragraph 10.
2. It will pay £200 sterling as costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-NINTH SESSION

***In re* Abdel Malek** **Judgment No. 1971**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Abdel Malek Wissa Abdel Malek against the World Health Organization (WHO) on 26 April 1999 and corrected on 7 May, the WHO's reply of 16 July, the complainant's rejoinder of 19 October 1999 and the Organization's surrejoinder of 18 January 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant was born in 1924 and is a citizen of Egypt and the United States. He joined the staff of the WHO in 1974 and worked as a technical officer in dental health in Kinshasa, Zaire, at grade P.4 and then P.5. He fell ill in 1979 and was on sick leave for four months. After he retired in January 1984 he continued to suffer from bouts of ill health. In 1990 his illness was diagnosed as chronic hepatitis C and the complainant is of the opinion that he had initially contracted it in Zaire in 1979. He regarded it as being service-incurred and on 27 May 1994 submitted a claim for compensation.

The Advisory Committee on Compensation Claims reviewed his claim but concluded that it was time-barred because it was made some 15 years after the initial onset of the illness. In a decision of 17 February 1995 the Director-General endorsed the opinion of the Advisory Committee and rejected the complainant's claim.

In July 1995 the complainant appealed to the Headquarters Board of Appeal which recommended that the case be sent back to the Advisory Committee for further consideration after review by a Medical Board. In a letter of 18 July 1996 the Director-General gave the complainant leave to refer the matter of the relationship between his illness and his service in Zaire to a Medical Board. The Medical Board, composed of three doctors, met on 12 June 1997. Each doctor submitted a report to the Advisory Committee. Their majority opinion was that it was likely that the complainant contracted the virus before taking up service for the WHO. On 11 November 1997 the Advisory Committee concluded that the complainant's illness could not be regarded as service-incurred and recommended that his claim be rejected. On 17 December 1997 the Secretary of the Advisory Committee informed the complainant that the Director-General had endorsed that recommendation.

On 11 February 1998 the complainant appealed to the Headquarters Board of Appeal against that decision. It issued its report on 16 October 1998 concluding that in the absence of scientific proof determining the time of the onset of the disease, the benefit of the doubt should go to the complainant. It recommended that the WHO should reimburse all medical expenses related to his chronic hepatitis C. The Director-General did not uphold that recommendation and so informed the complainant in a letter dated 20 January 1999 which the complainant impugns.

B. The complainant claims that his illness was service-incurred and that the should be paid compensation under Annex E to WHO Manual Section II.7. He argues that there was a strong likelihood that he contracted it while performing his duties as a dental surgeon in Zaire where he was assigned in 1974. Hepatitis, he says, was endemic in that part of Africa and the nature of his profession exposed him to it.

He points to errors of fact and contradictions in the reports of two of the doctors on the Medical Board and contests the view that his health condition predated his appointment to the post in Zaire. Inasmuch as the Director-General's decision was based on their findings it too is flawed. The reason why his illness was not diagnosed as hepatitis C during his service was because that virus was not yet known in 1979. The Organization should have carried out a more comprehensive check-up to assess his state of health when he joined the WHO in 1974. Having omitted to carry out appropriate tests at that time it cannot now in good faith contend that he already had chronic hepatitis when he entered its service.

The complainant asks the Tribunal to set aside the impugned decision and send his case back to the Organization so that it can determine his rights under the applicable rules on the assumption that he contracted hepatitis while in its service. He wants the Tribunal to specify that those rights will encompass: compensation due under Annex E to Section II.7 of the WHO Manual; his medical expenses resulting from his illness, including those incurred since he left the employ of the WHO plus the fees and expenses of the doctor who represented him on the Medical Board. He also claims costs.

C. In its reply the Organization says that for an illness to be declared service-incurred Annex E to Section II.7 requires that there should be a direct causal link between the illness and the performance of official duties. According to the Tribunal's case law the burden is on the complainant to prove that such a link exists. It argues that, on the balance of probabilities, it is more likely than not that he became affected by the hepatitis C virus before he began working for the WHO, and that his chronic hepatitis was not service-incurred.

In alleging errors of fact and flaws in the Medical Board's conclusions the complainant is merely seeking a reassessment of the medical findings. This Board had to determine whether the illness contracted in 1979 constituted the onset of hepatitis C, and whether the complainant could have contracted the virus directly as a result of his assignment in Zaire. The majority opinion of the Medical Board concluded that it was more likely than not that the virus had taken a hold earlier in his life. The fact that the three doctors on the Board held slightly different opinions was not evidence of any error. The correct procedure was followed in consulting them and their reports did not contain errors or contradictions.

D. In his rejoinder the complainant disputes certain findings of the Medical Board. He submits that he is not seeking a reassessment of the medical aspects of his case, but wants to show that the two members of the Board who recommended rejecting his claim "ignored the legal presumption in [his] favor that he was healthy" when recruited by the WHO and thus drew mistaken conclusions from the facts. He claims that they also overlooked essential facts in their clinical analysis of his illness.

The complainant says that when he fell ill in 1979 he did not ask to have his illness recognised as service-occurred because he had no idea at the time that it would be permanent. He underwent medical examinations prior to taking up his appointment with the WHO. He says he finds it surprising that considering the fact that he was a practising dentist the Organization did not carry out liver function tests at the same time. Even though hepatitis C was still unknown these tests would at least have revealed hepatic dysfunction if he was already infected by the virus. Had he already contracted the virus he could have put numerous patients at risk.

E. In its surrejoinder the Organization asserts that the members of the Medical Board gave careful consideration to all aspects of the complainant's case, and the fact that the complainant disagrees with their findings affords no basis for review.

It observes that the purpose of a medical examination on recruitment is to ascertain fitness for duty and not to search for clinical signs of illnesses that might evolve. Although no liver tests were performed when the complainant was appointed, failure to do so does not constitute negligence. The matter must be considered in the light of medical practice at the time.

The Organization considers that the complainant has failed to put forward any proof that his illness was service-incurred and says that in reaching a decision on the matter it complied with all the relevant rules.

CONSIDERATIONS

1. The complainant is a dental surgeon who worked in Nigeria for two years just prior to joining the WHO in August 1974 as a technical officer on a dental health project in Zaire.

2. In late 1979 the complainant experienced clinical symptoms which were diagnosed first as amoebic hepatitis and later as toxic hepatitis. The condition was treated as an isolated incident and he remained on sick leave for four months. An echography of the liver showed no abnormalities in January 1980. He retired on 31 January 1984 on reaching retirement age.

3. On 31 October 1990 the complainant tested positive for antibodies to the hepatitis C virus. In 1991 he had intermittent fever. In March 1993 a liver biopsy confirmed established cirrhosis of the liver as a result of chronic hepatitis C.

4. In May 1994 he submitted a claim for compensation for a service-incurred illness saying that he had contracted the hepatitis virus in Zaire in 1979. The rules governing compensation in the event of death, injury or illness are laid down in Annex E to Manual Section II.7. After reviewing his claim the Advisory Committee on Compensation Claims recommended that it be dismissed as time-barred and the Director-General accepted the recommendation on 17 February 1995.

5. The complainant appealed to the Headquarters Board of Appeal which recommended that the case be returned to the Advisory Committee for further consideration following a review by a Medical Board. On 18 July 1996 the Director-General informed the complainant that, in accordance with Annex E to Manual Section II.7, he would be permitted to consult a Medical Board about the relationship between the chronic hepatitis C diagnosed in 1993 and his employment in Zaire.

6. The Medical Board was composed of three doctors, one – Dr C – chosen by the Director-General, and one – Dr B – by the complainant, and both choosing the third one – Professor H.

7. At a meeting on 12 June 1997 the Medical Board examined two issues which are summarised below:

> "1. [The complainant's] contention that the chronic hepatitis C with which he was diagnosed in 1993 resulted ... directly from particular hazards to the health or safety to which the staff member ... was exposed solely as a result of the assignment by the Organization to an area in which these hazards existed in accordance with paragraph 4(b) of Annex E to WHO Manual, Section II.7; and
>
> 2. The medical relationship, if any, between the abnormal hepatic function experienced by [the complainant] in 1979 and the diagnosis of chronic hepatitis C in 1993."

8. Each doctor wrote a separate report.

9. On the first issue, Dr C. concluded that the probability was very high in the complainant's case that contamination took place before he joined the WHO, and gave his reasoning. On the second issue, he concluded that there was no medical evidence – clinical or biological – to show that the episode suffered in 1979 was related to an acute viral hepatitis, and gave his reasons.

10. Professor H. concluded with regard to the first issue, that the statistical probability that the complainant was contaminated between 1974 and 1979 was low and gave reasons; from a clinical point of view, while the possibility of contamination did exist, it seemed more likely that contamination had occurred earlier in life, and he explained why. On the second issue, he said that clinical judgment suggested that the liver tests in 1979 were abnormal because of an existing chronic hepatitis C condition, and gave reasons.

11. Dr B. said the presumption must be that the complainant was healthy when he joined the Organization and recalled that the WHO never carried out liver function tests on the complainant. He asked what evidence was needed to decide if the complainant had contracted hepatitis C in Zaire: scientific proof would be non-existent. In 1979 hepatitis C was unknown, but he did have hepatitis in 1979 although science could not prove it was actually hepatitis C. The burden of proof was on the Organization to show that he had liver disease prior to his employment and it had failed to do so.

In his opinion the course of evolution of the complainant's condition lands right on the decade he worked for the Organization.

12. The Advisory Committee met on 11 November 1997 to review the matter and in the light of the majority opinion of the Medical Board, it recommended rejecting the claim. This was accepted by the Director-General on 17 December 1997.

13. The complainant appealed against the decision to the Headquarters Board of Appeal on 11 February 1998. The Board of Appeal considered that the complainant had been given full medical clearance on entry to the Organization. The opinion of two of the medical practitioners that there was a high probability that the disease was contracted prior to entry could not lead to a definite conclusion. In the absence of scientific proof either way, the Board of Appeal said that, in accordance with long-standing principle the benefit of doubt should go to the staff member. It felt that the liability of the Organization should be restricted to covering medical and other expenses connected with the disease, with no further compensation. It recommended that the WHO should pay all the medical expenses relating to the hepatitis C treatment as well as certified legal expenses.

14. The Director-General did not accept the conclusions of the Board of Appeal. By a letter dated 20 January 1999 she stated that, as reflected in the Tribunal's case law and based on the evidence available, the requirement should be to show that it was more likely than not that the illness was service-incurred. Taking into account all the material evidence, and in particular the findings of the Medical Board, she could not see this to be the case.

15. The Director-General, in reaching her decision, rejected the conclusion of the Board of Appeal that, while the probabilities were high that the hepatitis C was contracted prior to entry to the Organization, this could not lead to a definite conclusion. The test in this case is not whether there is definite or positive proof or proof beyond reasonable doubt, but whether on the balance of probabilities it is more likely than not that hepatitis C was contracted at a particular time (Judgment 1373 *in re*

Kogelmann Nos. 1, 2, 3, and 4). In the present case the preponderance of opinion of the Medical Board was that it was more probable that it was contracted prior to entering into the WHO's service.

16. The burden of proof is on a complainant to show that, on the balance of probabilities, the facts which he alleges have been established. The Tribunal will not substitute its opinion for the opinion of the majority of the Medical Board. It will review the procedure and will only intervene in appropriate circumstances.

17. Contrary to Dr B.'s assumption, there is no presumption that the complainant did not have hepatitis C on entry to the Organization. He did not have any obvious disability so all the medical examination on entry could do was to pass him as being fit for work.

18. The Tribunal will not reassess the medical aspects of this case. There is no evidence that either Dr C. or Professor H. overlooked any relevant facts or drew mistaken conclusions from them. They gave their medical opinion based on the available facts. Therefore, the complaint must fail.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative

EIGHTY-NINTH SESSION

***In re* Bartolomei de la Cruz** **Judgment No. 1972**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Héctor Guido Bartolomei de la Cruz against the International Labour Organization (ILO) on 28 July 1999, the ILO's reply of 29 October, corrected on 8 November 1999, the complainant's rejoinder of 13 March 2000 and the Organization's surrejoinder of 19 April 2000;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in 1941 and has both Argentine and Italian nationalities, joined the International Labour Office, the ILO's secretariat, in 1973 as a lawyer in the International Labour Standards Department. He was appointed director of the department in 1992.

On 5 November 1998 a member of his staff handed in to the complainant copies of two e-mail messages addressed to an official of the Standards Department which he purportedly found in a photocopying machine. The first, dated 15 October 1998, mentioned that it was a foregone conclusion that the official in question would be promoted following a forthcoming competition. In the second, dated 3 November 1998, a member of the ILO's Multidisciplinary Team in Lima, Peru, asked the official to join him in Ecuador in order to take part in a sub-regional seminar in preference to another member of the team. The complainant decided to report the matter to the official's immediate supervisor. The supervisor spoke with the official, who told him that the e-mails were private and that he intended to report the incident to the Staff Union Committee, of which he was a member. On 12 November, the complainant sent a minute to the Director of the Personnel Department attaching copies of the two e-mails and asking her to take appropriate action. In a minute of 18 November she replied that the e-mails appeared to be private and inquired how they had come into the complainant's possession. In another communication of 18 November, she asked all concerned to exercise restraint.

Meanwhile, on 13 November 1998 several members of the Staff Union Committee published a "Flash" entitled "E-mail and the invasion of privacy: how low will your director of department go?" That "Flash" accused a director of department of having read two "private and personal" e-mails of a staff member, and said that the Staff Union Committee "had to note yet again that not all chiefs conform to the *Standards of Conduct in the International Civil Service*", and was "sorry to be the bearer of news that encourages staff to be suspicious of their chiefs".

By a minute of 20 November, headed "A libellous flash", the complainant replied to the Director of Personnel denying the accusations contained in the "Flash" of 13 November. In her reply of 24 November, the Director of Personnel took the complainant to task for sending copies of the above-mentioned minute to numerous colleagues in the ILO, and reminded him of his duty of reserve. On 26 November the complainant wrote to the Director-General protesting at the "calumny and libel contained in the 'Flash' of 13 November 1998". He planned to publicise the document as a right of reply. By a letter of 27 November the Director of Personnel informed him that, since he had disregarded her recommendations she had no alternative but to refer the matter to the Director-General. On 11 December, she sent the complainant a minute explaining that, in view of his conduct, the Director-General deemed that he was unable to maintain a stable and productive working environment in his department.

Consequently, he had decided to assign the complainant to other duties from 14 December 1998 until the Personnel Department had finished investigating the matter. In the meantime, his new official title was to be Special Adviser on International Labour Standards. However, if he preferred, he could apply for special leave with pay.

On 27 February 1999 the complainant lodged an internal complaint with the Director-General on the grounds that the Organization had sanctioned him without applying the appropriate procedure. By a letter of 29 April, which is the impugned decision, the Director of Cabinet informed the complainant that his internal complaint was rejected. By a letter of 24 May 1999 the Chief of the Personnel Administration Branch sent him the findings of the investigation, stressing among other things that the e-mails were private.

B. The complainant alleges that removing him from his duties and reassigning him to a position having "no substance" amounted to a "hidden sanction", since no disciplinary proceedings had been conducted. Furthermore, by putting him in an office at some distance from his department, the Organization placed him in "geographical isolation", which, he says, is a form of mobbing.

He contends that the conclusions of the investigation show bias because the two e-mails were deemed to be private. This totally disregards Circular No. 41 of 14 April 1998 setting out guidelines for the use of electronic mail. There was also prejudice in the conclusion that the "Flash" of 13 November 1998 was not libellous because it did not mention him by name. The complainant alleges that if the victim is identifiable without being named in the offending publication, as is the case here, such prejudice is established. He submits that, although he was not identified in the "Flash", his name was communicated to the entire staff, "all over the world", as being the Director in question. In his view, an administration that was attentive to the dignity of its staff would not have allowed such a flash to be circulated without reacting in some way. In the past, particularly when the Staff Union published something similar in 1994, the Director-General reacted "very firmly". In this case, however, the Administration issued no publication to set the record straight. Lastly, his honour has been slighted and his health "seriously affected". Indeed, he is still suffering from serious tension and depression.

He asks the Tribunal to quash the decision of 29 April 1999. He seeks compensation for moral injury, and reimbursement of any medical costs not covered by the ILO's health insurance scheme incurred by him and his wife as a result of the publication of the "Flash" and the decision of 11 December 1998. He claims costs.

C. The Organization replies that the complaint, which is against a transitional but final decision, is receivable within the meaning of Article VII, paragraph 2, of the Statute of the Tribunal. However, the complainant's claim to repayment of his medical costs is irreceivable in that he has not exhausted the procedure for claims to compensation for illness or injury attributable to the performance of official duties. Besides, the Tribunal is not competent to rule on injury allegedly sustained by the spouse of a staff member.

On the merits, the Organization explains that the complainant's new duties consist in providing "high-level" guidance and advice on standards and social protection with a view to the preparation of a report which has "an excellent reputation". The Director-General deemed it necessary to reassign the complainant, keeping in mind that the ILO had a duty to give him responsibilities that corresponded to his qualifications, experience and grade. His new title and the office given to him undoubtedly met that requirement. It adds that the complainant never took up his new duties owing to ill health, so his objections have no basis in fact.

In its submission, whether or not the "Flash" is libellous, and whether or not the e-mails are private is immaterial. As Director of the Standards Department, the complainant had the authority to "correct the professional conduct" of the recipient of the e-mails, for example by a warning or a reprimand, and to protect the official in the Multidisciplinary Team whose participation in a seminar was in doubt. For all other matters, only the Personnel Department was competent. The ILO expects a director of department fully to respect the procedures in force. The complainant's failure to do so would have been reason enough to reassign him. Reassignment became inevitable in the light of "his persistence and the adverse consequences for the Organization" and in particular for the Standards Department.

The ILO deems it unnecessary to answer the allegations of prejudice and "mobbing" in view of the obvious lack of evidence. The reference to a circular issued in 1994 "calling the Staff Union to order" is immaterial because the circumstances of the present case are quite different. Lastly, the complainant's plea that his dignity was impaired is devoid of merit in that his reassignment was a temporary measure taken to protect his good name.

D. In his rejoinder the complainant asserts that his claim to medical costs concerns only the costs not covered by the ILO's health insurance scheme. Consequently, it does not depend on the fate of his claim to recognition of his illness as service-incurred.

He observes that the only issue is whether or not the decision to reassign him amounts to a hidden form of disciplinary action. The decision was "not even appropriate" because transferring him would not prevent him from giving more publicity to the incident.

E. In its surrejoinder the defendant maintains that the claim to reimbursement of medical costs is irreceivable. The complainant will be entitled to full reimbursement of the costs only if his claim to recognition of his illness as service-incurred is allowed. But that claim is still pending.

Like the complainant, it considers that the case turns solely on whether his reassignment amounted to a covert disciplinary sanction. It submits that by confining his pleas to the "subjective effects" of the measure, the complainant has failed to discharge himself of the burden of proving the existence of a flaw affecting the validity or legality of the reassignment.

The purpose of the decision to assign him to other duties was first and foremost to restore a "more stable and productive" working environment in the department that he headed at the time. The intent was to prevent him not from publicising the incident but from doing so in his capacity as Director of the Standards Department. The decision was made public only because the complainant wanted to draw attention to the measure applied to him. Consequently, if his reputation was impaired he cannot hold the Organization responsible.

CONSIDERATIONS

1. The complainant, who was Director of the International Labour Standards Department of the ILO, is asking the Tribunal to quash the Director-General's decision of 29 April 1999 upholding a decision of 11 December 1998 to assign him to new duties as a Special Adviser on International Labour Standards. The measure was described as provisional and was deemed necessary in order to restore calm following a number of incidents which will be discussed below. The complainant challenged it in an internal complaint filed under Article 13.2 of the Staff Regulations on grounds of unfair treatment. He alleged that the decision amounted to a disciplinary sanction which the Organization applied without conducting disciplinary proceedings. The ILO retorted that it was a management decision which had to be taken in order to re-establish normality to a working environment that had considerably deteriorated in the Standards Department. On 29 April 1999 the Director of Cabinet rejected his internal complaint, but told the complainant that since the entire matter was being thoroughly investigated, the measure could only be a provisional one, that he would keep his grade and that everything had been done to preserve his interests and, in particular, to ensure that his new duties matched his high level of competence. Dissatisfied with this response, the complainant is challenging it before the Tribunal on the grounds that the Administration took disciplinary action against him by removing him from his duties and transferring him to a position without any substance and that, at the very least, it failed seriously in its duty of care towards him and impaired his dignity and good name.

2. The background to the case is set out under A above. The most salient facts are as follows.

In early November 1998 the complainant was given two e-mails addressed to an official in the Standards Department, one from the officials's father and the other from a colleague in Lima. The communications were written in highly indecorous terms and, although private, commented on the running of the department, the career prospects of various members of staff and a forthcoming competition for a post. The complainant sent the two e-mails to the recipient's supervisor and to the Director of Personnel, whom he asked to "take the necessary steps to prevent any recurrence of the situation". It has now been ascertained, following an inquiry conducted by the Organization, that the two e-mails were handed in to the complainant by a member of his staff who had found them in a photocopier. However, on 13 November 1998 the Staff Union issued a "Flash" entitled "E-mail and the invasion of privacy: how low will your director of department go?" The flash stated that a member of staff had been shocked to discover that "at least two of his private and personal e-mails – one of them sent to him by his father – had been read by the director of a department, who passed copies to his immediate supervisor". It also drew attention to the measures to be taken to ensure the confidentiality of messages sent over the Internet and criticised the "unacceptable behaviour of one director of department".

In a confidential minute of 18 November 1998, the Director of Personnel informed the complainant that the matter had been referred to her by the Staff Union, and asked him to explain how he had come by the e-mails. The complainant replied in a minute of 20 November, headed "A libellous flash". Although his attention had been drawn to the need to keep the matter confidential, the complainant sent a copy of his reply to numerous colleagues. In a minute of 24 November, the Director of Personnel took him to task for his conduct pointing out that the minute of 20 November implied serious allegations against two officials, revealed identities, fell far short of the highest standard of conduct that the Organization expects of its officials and portrayed a poor image of an international civil servant who had decided to take the law into his own hands. She added that a number of officials had indicated that they did not wish to be involved in the matter and had asked the Personnel Department to take the necessary measures to restore a productive working atmosphere in the Office. She requested the complainant to stop circulating correspondence and to withdraw his request to have his previous minute, which she qualified as defamatory towards certain colleagues, published in the Staff Union's bulletin. In conclusion she informed him that an investigation had been opened to clarify all aspects of the matter.

Far from complying with her appeal for restraint, on 25 November the complainant wrote a minute to the Director-General and, although it was headed "confidential", sent copies of it to numerous members of staff. In it, he sought the suspension and dismissal of both the author and the recipient of one of the e-mails, which he quoted in full. In a further minute to the Director-General, dated 26 November, which he also communicated to other members of staff, he named nineteen officials whom he accused of participating in the production, adoption and dissemination of the flash, and asked the Director-General

> "(a) to order each of the persons accused to prove, within a non-renewable period of ten calendar days at most, their accusation that [a staff member's] electronic mail [box] was violated by one of the Directors of the Office;
>
> (b) if they were unable to produce such proof, to take steps to ensure that they publicly withdraw their accusation;
>
> (c) if they were unable to prove their accusation and refused to withdraw it, to apply the disciplinary action provided for in Article 12.7 of the Staff Regulations."

Following the dispatch of the above minute, the Director of Personnel told the complainant on 27 November that she would inform the Director-General of the situation created by his conduct, which, in addition to breaching the confidentiality she had asked him to observe, ran counter to due process with regard to the officials implicated and obstructed the proper functioning of the Office. On 11 December 1998 the Director-General decided that, in view of the fact that the complainant was unable to maintain a stable and productive working environment in his department, he should be assigned to new functions until the Personnel Department had completed its inquiry.

By a letter of 29 April 1999, which is the impugned decision, the Director of Cabinet informed the complainant of the rejection of his internal complaint against the decision of 11 December 1998 to assign him to new duties.

3. The main issue in the present complaint is whether the complainant's reassignment should be regarded as a disciplinary sanction, in which case it must be quashed because the proper procedure for disciplinary action was clearly not applied, or whether it was a measure warranted by the needs of the service and taken by the Director-General within the discretion conferred on him by Article 1.9(a) of the Staff Regulations which allows him, in the interests of sound administration, to "assign an official to his duties and his duty station subject to the terms of his appointment, account being taken of his qualifications". The difficulty of this case stems from the fact that two types of consideration were taken into account in the decision to assign the complainant to new duties. The complainant's conduct, as recounted by the Director of Personnel among others, undoubtedly constituted the reason for his being removed from what were very important duties, specific and serious charges having been brought against him in the minutes sent to him in November 1998. But the main factor taken into account was the proper running of the service, which was seriously disrupted by the fact that a senior official – albeit, understandably, in an attempt to defend himself against unjustified attacks – had no compunction about breaking the most elementary rules of confidentiality and made public accusations against a number of colleagues and staff members, identifying them by name. The Administration decided against the immediate disciplinary procedure initially envisaged and felt that suspension for the duration of the inquiry was inappropriate. In view of the deteriorating climate, which the complainant did nothing to appease, though of course it was far from being only of his making, it was only natural that the Organization should take at least a provisional measure to ease the situation. As the Tribunal held in Judgment 1018 (*in re* Saunders No. 4), it is the duty of the head of any international organisation to take whatever measures can reduce tensions among his staff, and a transfer in the interests

of the service may be an appropriate way of settling a conflictual situation. In any event, the Tribunal cannot find fault with the Director-General for having exercised his discretion in deciding that the circumstances warranted the reassignment of a director whose department was no longer functioning properly.

4. However, since it cannot be regarded as disciplinary, the measure must, as the case law prescribes, heed the staff member's dignity and good name and not cause him undue suffering. Clearly, in this case the complainant was bound to view the measure as downgrading him. However, the fact that the Organization was at pains to find him an assignment in keeping with his competence if not his wishes, to maintain his grade and to exercise the utmost discretion in dealing with the matter, shows that everything was done to protect his dignity as a senior official. The letter addressed to him on 11 December 1998 on the Director-General's behalf is significant in this respect. There is no evidence to support the complainant's assertion that a problem which arose in 1996 accounted partly for the Organization's bias, or his allegation of harassment. Similarly, the testimonies he relies on establish his professional qualities and leave no doubt as to his competence. However, they have no bearing on the lawfulness of a decision which was taken in the interests of the proper running of the Department and with a view to preserving, as best it could, both confidentiality, already seriously undermined, and at all events the complainant's dignity.

5. That being so, his claims to the quashing of the decision and, in the circumstances of the case, his claim to compensation for moral injury cannot succeed. Nor can his claim to reimbursement of the medical costs that he and his wife incurred as a result of the publication of the Staff Union Committee's flash and the Administration's decision, since it is linked to his claim to recognition of his illness as service-incurred which still awaits a decision.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Registry's translation, the French text alone being authoritative.

EIGHTY-NINTH SESSION

***In re* Siegfried**

Judgment No. 1973

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Marie-Christine Siegfried against the International Telecommunication Union (ITU) on 27 September 1999 and corrected on 1 December 1999, the ITU's reply of 31 January 2000, the complainant's rejoinder of 10 March and the Union's surrejoinder of 13 April 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Swiss national born in 1949, joined the ITU in March 1971 as a typist at grade G.2 under a short-term contract, which was extended several times until 30 November 1971. From 1 December 1971 to 31 July 1973, she obtained a fixed-term appointment as a shorthand typist at grade G.3. She was given a permanent appointment on 1 August 1973 and was then promoted to grade G.4 on 1 January 1975. Between 1974 and 1996 she was entrusted on several occasions with functions of a grade higher than her own for which, each time, she received a special post allowance.

On 17 September 1998, the ITU published Service Order No. 99, entitled "Personal Promotion", indicating that by Resolution 1106 the ITU Council had resolved inter alia:

> "that a personal promotion scheme be implemented in order to give staff in occupational groups with limited career opportunities the possibility of being treated on an equal footing with staff members having more frequent promotion opportunities"

To benefit from the promotion, staff members in the General Service category must fulfil several criteria, including the completion of at least twenty years of continuous service in the ITU, not having been promoted during the last fifteen years and having spent more than three years at the top step of their grade. In addition, the work of the candidates for such promotion must have shown "a superior level of performance, in both quantitative and qualitative terms". This promotion scheme came into effect as from 1 January 1998.

By a memorandum of 21 September 1998, the Acting Chief of the Personnel and Social Protection Department informed the Chief of the Department of Common Services, the complainant's second-level supervisor, that she met the basic conditions for the granting of a personal promotion and requested him to complete the attached form. On 22 September, the Chief of the Publication Composition Service, the complainant's first-level supervisor, completed the form and indicated that she had "always produced work regularly with a good average of output". The Chief of the Department of Common Services countersigned the document and added by hand "promotion recommended". On 1 October, the Appointment and Promotion Board issued an unfavourable opinion concerning the personal promotion of the complainant on the grounds that her performance did not seem to have been of "a superior level". By a letter of 8 October, the Secretary-General informed the complainant that he could not grant her the requested promotion. Having been given no reasons for this refusal, the complainant appealed to the Secretary-General in a memorandum of 2 November requesting him to review his decision. By a letter of 14 December, the Acting Chief of the Personnel and Social Protection Department informed the complainant that the matter would be referred once again to the Appointment and Promotion Board. On 18 December 1998, the Board re-examined the complainant's case and once again issued an unfavourable opinion. It considered that her "output" had not "exceeded 90 per cent of the average" and that her work could not therefore be considered to have always shown "a superior level of performance in qualitative and quantitative terms". In a letter of 20 January 1999, the Secretary-General informed the complainant that a personal promotion could not be granted to her at that time, but that the Board had proposed to review her situation on 1 January 2001.

By a memorandum of 23 February 1999, the complainant referred the matter to the Appeal Board. She argued that the Appointment and Promotion Board had evaluated her work "without reference to the reports of [her] supervisors" and that the Secretary-General had not yet informed her of the reasons for his second refusal. On 30 April, the Appeal Board issued the opinion that the reasons for refusing her the promotion were based on a mistaken interpretation of her most recent annual report. It therefore recommended the Secretary-General to review his decision. By a letter of 27 July 1999, which is the impugned decision, the Secretary-General informed the complainant that he upheld his decision to refuse her the personal promotion that she was seeking. He explained that the conclusions of the Appeal Board were based essentially on an examination of her last annual report that showed the quality of her work only over a one-year period, which was too short for the present purposes. Moreover, an examination of her annual reports showed that her work had been qualified as "satisfactory", but never "very good", except for the last report. He added that the complainant's case would be re-examined by the Appointment and Promotion Board in 2001.

B. The complainant contends that the impugned decision is unlawful. She criticises the "excessively strict interpretation of the criterion regarding the performance" of candidates for personal promotion, as set out in Service Order No. 99. She says that the annex to the Service Order does not contain any guidelines for the procedure to be used in evaluating the quality of work nor the reference period to be taken into consideration. Broad discretion is therefore left to the Appointment and Promotion Board and to the Secretary-General, but this power has to be exercised within the framework set out in Council Resolution 1106 and the case law of the Tribunal. The purpose of the personal promotion scheme is to offer opportunities for promotion where they do not exist, and the complainant deduces that, by analogy with the procedure applicable for competitions, the quality of the staff member's performance must be assessed "at the period when the personal promotion is envisaged". The training acquired and the attitude of the person concerned over the most recent period must therefore be determining factors in granting or rejecting an application. The same applies to the criteria regarding the period since the last promotion or the granting of the highest step in the grade. As these "decisions" demonstrate that the staff member applying for personal promotion has given full satisfaction, there is no reason for the assessment to cover earlier periods. The Secretary-General therefore applied in the complainant's case an additional requirement to the criteria set out in Service Order No. 99 when he considered that her promotion would only be possible if several of her annual reports contained the assessment "very good".

The complainant also contends that the evaluation of the quality of her work was based on mistaken or incomplete information, particularly since the Secretary-General did not take into account the very long periods during which she had been entrusted with functions of a higher grade and for which she had received a special post allowance. She adds that greater weight should have been given to the recommendation of the Chief of the Department of Common Services. She emphasises that the Appeal Board indicated that she had achieved 98 per cent of the objective set for her.

The complainant asks the Tribunal to set aside the decision of 27 July 1999 insofar as it confirms the refusal of the Secretary-General to grant her a personal promotion for the year 1998 and to order the ITU to promote her to grade G.5 as from 1 January 1998. She claims 10,000 Swiss francs in damages for the delay in her promotion and the moral injury suffered, and 5,000 francs in costs.

C. In its reply the Union submits that the complainant's reasoning is "in flagrant contradiction" with the underlying logic of the personal promotion scheme. It says that any system of promotion is based on an evaluation of the complete profile of candidates and the whole of their career. It is in this respect that the principle of promotion differs from the system of periodic within-grade advancement by step. Reducing the performance assessment for the personal promotion scheme to an exercise equivalent to the one carried out under the provisions for periodic advancement by step would amount to voiding the whole exercise of its justification. When adopting the scheme, the intention was that the performance assessment for personal promotion should be based on criteria requiring "a superior level of performance". If the intention had not been to emphasise this difference with the system of advancement by step, staff members applying for the promotion would not have been required to show that their performance had been "superior". The Secretary-General therefore exercised his discretion within the framework set out in Service Order No. 99. The Union adds that the basic principles on which the personal promotion scheme was designed were established by the International Civil Service Commission.

The complainant's argument concerning her productivity is irrelevant in the present case as this criterion was not a determining factor in the Secretary-General's decision.

D. In her rejoinder the complainant admits that it is in accordance with Service Order No. 99 to require that a significant period of her career should be taken into consideration and emphasises that she is criticising the Union precisely for not having taken her career and the actual quality of her performance fully into account. She adds that the functions which she has been discharging since 1986 have required a "significant capacity for adaptation" and would have justified a reclassification of her post as they correspond to the requirements of a post at grade G.5. In support of her argument she says that most of the staff members in her service performing the same work as her are in posts at a higher grade.

E. In its surrejoinder the Union points out that the functions corresponding to the complainant's post were reviewed in November 1999 and that the classification of her post was confirmed at grade G.4. It adds that in any event a personal promotion is not intended to correct shortcomings in the classification of a post. Finally, there is nothing in the file which gives the complainant grounds for claiming that the Secretary-General did not take one of the assessment criteria into account.

CONSIDERATIONS

1. The complainant joined the ITU in March 1971 as a typist under a short-term contract which was extended several times. In December 1971 she was given a fixed-term appointment as a shorthand typist at grade G.3 and obtained a permanent appointment in the same functions at the same grade in August 1973. She has been at grade G.4 since 1975.

During her career, the complainant on several occasions received a special post allowance for carrying out work of a grade higher than her own.

2. On 17 September 1998, the Union issued Service Order No. 99 introducing a personal promotion scheme in accordance with Resolution 1106, which had been adopted by its Council in 1997. The Service Order determined the procedures and criteria for granting a personal promotion and indicated that the scheme came into effect as from 1 January 1998. The required criteria were set out in an annex, which provided that:

> "1 As conditions for the granting of a personal promotion, it shall be required that:
>
> a) the staff member has completed at least
>   - 18 years (Professional category)
>   - 20 years (General Service category)
>
> of continuous service in ITU ...
>
> e) the staff member has shown a superior level of performance, in both quantitative and qualitative terms;
>
> f) the staff member has shown evidence of self-development (capacity for maintaining state-of-the-art expertise in his/her domain of activities, enhancement/updating or acquisition of general and technical skills required not only for the full accomplishment of the tasks of his/her post but also for the enlargement of his/her career prospects);
>
> 2 It is clearly understood that a staff member will be considered eligible for personal promotion only if he/she meets all the aforesaid criteria."

3. Since it was considered that the complainant met the basic conditions for claiming a personal promotion, her application was submitted to the Appointment and Promotion Board.

On 1 October 1998, the Board issued an unfavourable opinion concerning the complainant's personal promotion on the grounds that her performance did not appear to have been of "a superior level".

The complainant was informed on 8 October of the Secretary-General's decision not to grant her a personal promotion. In a memorandum of 2 November 1998, she requested the Secretary-General to review his decision.

The Appointment and Promotion Board examined the case once again and confirmed its unfavourable opinion. It recommended that the complainant's application be re-examined in 2001.

On 20 January 1999, the Secretary-General informed the complainant that he had decided once again to refuse her personal promotion.

The complainant referred the matter to the Appeal Board which, on 30 April, considering that the reasons for refusing to grant the complainant a personal promotion were based on a mistaken interpretation of her most recent annual report, recommended the Secretary-General to review his decision. On 28 July 1999, the complainant was informed of the Secretary-General's final decision confirming his refusal to grant her a personal promotion, although it was emphasised that the positive development noted in her last annual report justified the re-examination of her case in 2001.

That is the decision which is impugned in this complaint.

4. The complainant requests the Tribunal to set aside the Secretary-General's decision insofar as it confirms his refusal to grant her a personal promotion for the year 1998, and as a consequence to order the ITU to promote her to grade G.5 as from 1 January 1998; to order the ITU to pay her 10,000 Swiss francs in damages for the delay in her promotion and the moral injury suffered, as well as 5,000 francs in costs.

5. The Tribunal has always held that personal promotion constitutes advancement on merit to reward someone for services of a quality higher than that ordinarily expected of the holder of the post.

The granting of personal promotion is a discretionary decision which, as firm precedent has it, is subject to only limited review and will stand unless it shows a fatal flaw. In a case such as the present one, in which the general rules regarding personal promotions have been adopted and communicated to the staff, the appointing authority is bound by these rules and the Tribunal will consider any violation of them to be a fatal flaw.

6. The complainant contends that the impugned decision is unlawful as a result of what she qualifies as "an excessively strict interpretation of the criterion regarding the performance ... as set out in Service Order No. 99". She says that the Secretary-General's decision did not really take into account her career and the actual quality of her performance, but that the examination of her candidacy was confined to the evaluation contained in her latest annual reports.

However, she does not contest the fact that Service Order No. 99 establishes high requirements regarding the performance of applicants for personal promotion and she admits that taking into account "a significant period" of her career, as was done by the Appointment and Promotion Board and the Secretary-General, is in accordance with these requirements.

7. The Union indicates that the personal promotion scheme which it introduced is designed "to compensate and therefore to reward staff members whose superior level of performance would have been recognised through promotion if they had not been part of an occupational group in which promotion opportunities are extremely limited".

The ITU emphasises that the Secretary-General correctly assessed the complainant's merits, career and performance evaluations as a basis for his decision not to grant her a personal promotion, and that he took into account her successive annual reports, the development of her career and the various special post allowances which she had received, as well as the favourable recommendation by the Chief of the Department of Common Services and the two successive evaluations of her application carried out by the Appointment and Promotion Board.

8. The evidence shows that, in deciding to base his assessment on several elements over a significant period which went beyond the

assessments required for periodic within-grade advancement by step, which are generally limited to a specified recent period, that is twelve months prior to the date on which the decision is to be taken, the Secretary-General did not depart from the criteria set out in the annex to Service Order No. 99, and particularly those indicated in paragraph I.1 e) of the annex. Nor did he interpret in an excessively strict manner the criterion concerning the quality of the staff member's performance which, under the terms of the above paragraph, must be of "a superior level ... in both quantitative and qualitative terms".

9. The complainant contends that the impugned decision is flawed because the quality of her performance was evaluated on the basis of mistaken facts or incomplete information. In her view, the Secretary-General did not take into account the very long periods during which she had been entrusted with functions of a grade higher than her own and for which she had received a special post allowance. She also observes that neither did he take into account the fact that it had not been possible to establish fully her annual reports prior to the year 1997-1998 because the system for evaluating performance in her Service had not become fully operational. She adds that these reports had also been drawn up late and that the quality of her performance should therefore have been assessed through other means.

Finally, she says that the Appointment and Promotion Board and the Secretary-General committed a factual error in their evaluation of her performance in her last annual report. In her view, they should have distinguished between the overall output objective for the Service (25 pages a day) and the personal objective which had been set for her (22.55 pages a day).

10. There is no evidence that the Secretary-General failed to take into account the periods during which the complainant had been entrusted with functions of a grade higher than her own. These periods were taken into account among other elements in reaching a global assessment of the quality of her performance over a significant period.

With regard to the claim concerning the conditions under which the annual reports prior to the year 1997-1998 were drawn up, the Tribunal notes, as did the Union, that these reports had been approved by the complainant and her supervisors and that they had not been challenged. The Secretary-General, in the same way as the Appointment and Promotion Board, was therefore right to consider that these reports contained a sound assessment of the complainant's performance.

As for the last annual report the Tribunal finds, firstly, that this was only one of the elements taken into account by the Secretary-General in reaching his decision and, secondly, that the achievement by the complainant of the objective which had been set for her personally, and which was below the average required to achieve the overall productivity level of the Service, does not amount to any particularly meritorious performance which might justify the granting of a personal promotion.

11. It therefore follows that the impugned decision did not violate any of the general rules concerning personal promotion, nor is it affected by any fatal flaw. The complaint must therefore fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-NINTH SESSION

***In re* Camara** **Judgment No. 1974**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Amadou Lamine Camara against the International Labour Organization (ILO) on 8 July 1999 and corrected on 27 August, the ILO's reply of 26 November 1999, the complainant's rejoinder of 6 January 2000 and the Organization's surrejoinder of 8 March 2000;

Considering Article II, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Senegalese citizen born in 1945, joined the International Labour Office, secretariat of the ILO, as a Senior Programme and Administrative Support Officer (SPASO) at the ILO Area Office at Dakar on 2 June 1998 under a three-month contract. In view of his wide professional experience he was given three additional within-grade steps.

On 26 August 1998 during a "performance assessment interview" which was later recorded in a note for the file, the Director of the Dakar Office raised objections to the complainant's work and his relations with his colleagues and told him that he expected improvement. On 31 August the Director informed him that his appointment would not be renewed because certain "presumptions" concerning the quality of his work had been "confirmed and had worsened" since the interview. He nonetheless offered the complainant an extension of contract from 1 to 4 September in order for the latter to "settle some matters still pending".

By a letter of 4 September the complainant submitted an internal complaint to the Director-General under Rule 9.1 of the Rules governing conditions of service of short-term officials, consisting of several claims and alleging unjustifiable treatment on the part of the Director of the Dakar Office. Having received no reply within the sixty days prescribed by Article VII(3) of the Tribunal's Statute, on 11 November 1998 he informed the ILO that he would put his case to the Tribunal. The ILO asked him to postpone his application to the Tribunal in order to give it time to complete the examination of his internal complaint. He agreed. The Director of the Dakar Office submitted comments and the complainant had the opportunity to reply to them.

On 9 April 1999 the Director of the Personnel Department replied to the internal complaint on the Director-General's behalf. She noted that the complainant should have been offered a fixed-term and not a short-term appointment; that it could not be concluded from the evidence that his performance was unsatisfactory although there had been some incidents; that he had several times been right to draw attention to proper procedure but that his insistence was misplaced; and that the work certificate submitted by the Director of the Office reflected neither the nature of his duties nor the length of his service. His claim to reinstatement was rejected because the job in question did not "measure up to the aspirations of someone of [his] experience". Instead he was offered compensation in an amount of 20,250 United States dollars, which was equivalent to one year's pay and allowances as from 1 June 1998 plus the amount of one year's contributions by the ILO to the United Nations Joint Staff Pension Fund and the Staff Health Insurance Fund, minus the amounts received during his period of actual service. His claim to the withdrawal of documents from his personal file was allowed in part and the Director of the Dakar Office would give him another work certificate taking account of the observations made in the complainant's internal complaint.

In a memorandum of 22 April 1999 the complainant again claimed reinstatement and objected to the decision to keep in his personal file the note written by the Director of the Office following the "assessment" of 26 August 1998. In a memorandum of 2 June 1999 he said that, in lieu of reinstatement, he was prepared to accept compensation but in a global sum of 63,845 dollars, which is equivalent to two years' salary and allowances, a termination indemnity equal to three months' pay, one month's notice and reimbursement of costs. Having received no reply, he filed this complaint on 8 July. In a fax message of 13 July the Director of the Personnel Department rejected his claims and informed him that the compensation offered originally would be paid into his account. He was also informed by a copy of a letter of 23 July 1999 from the Director of the Personnel Department to the Director of the Dakar Office that the offending note on the performance assessment interview would be withdrawn from his personal file.

B. The complainant submits that in the letter of 9 April 1999 the ILO admitted its mistakes, acknowledged that he was not guilty of misconduct and recognised that his claims were warranted. Furthermore, the only argument adduced to justify the refusal to reinstate him is that his aspirations were higher than the post he held, which he denies. He contends that the ILO refused to find him another assignment. He emphasises the seriousness of dismissal at his age. Lastly, the "malevolent behaviour" of the Director of the Dakar Office caused him moral as well as material injury in that it was an affront to his honour and professional reputation.

He seeks reinstatement with retroactive effect on a fixed-term contract of at least two years in accordance with what he says is the ILO's practice, "professional rehabilitation from an administrative point of view", material and moral damages, and an award of costs.

C. The ILO replies that the complaint is devoid of merit. It refers to a number of incidents and submits that the decision not to renew his appointment, which was substantiated in the letter of 9 April 1999, was taken within "the broad discretionary authority" of the Director-General. The Tribunal reviews such decisions "with particular caution in the case of a staff member on probation". The ILO points out that the complainant was recruited through a local competition to serve in a specific duty station and so may not be transferred elsewhere. It adds that "any reticence about employing someone of his age with professional experience and qualifications such as his can be overcome". It asserts that probationary appointments are initially for one year and that the practice cited by the complainant does not exist. Furthermore, he fails to prove malevolent behaviour on the part of the Director of the Dakar Office or the existence of moral or financial injury since none of the evidence has been made public and the ILO has paid him compensation.

D. In his rejoinder the complainant disclaims responsibility for the quarrels that arose with some of his colleagues. He accuses the Director of the Dakar Office of reacting violently, going so far as to insult him in public for drawing attention to breaches of the rules by some staff members. In his submission the ILO's arguments rely entirely on the note concerning his performance assessment which the Organization agreed to withdraw from his file and which, therefore, is no longer valid. He denies that the normal length of a first appointment is one year and asserts that the External Offices Manual allows a locally-recruited staff member to be transferred to a technical cooperation project. In support of his pleas concerning his age he produces an extract from a vacancy notice of another international organisation indicating a preference for candidates under 55 years of age. He observes that the ILO adduces no evidence that the events in Dakar were kept confidential and presses his pleas of moral and financial injury. He submits that the termination of his appointment was also unlawful because it was in breach of the procedures prescribed in the External Offices Manual.

He informs the Tribunal that on 3 November 1999 the Dakar Office transferred 8,573,753 CFA francs to his account with no explanation although he had rejected the Director of the Personnel Department's offer of 20,250 dollars (12,645,537 CFA francs by his reckoning).

Finally, the complainant indicates the costs he incurred in the present case and presses his claim for costs.

E. In its surrejoinder the ILO acknowledges that the complainant was not responsible for the quarrels at the Dakar Office but explains that relations between the parties had so deteriorated that renewal of his appointment was "unthinkable". It denies that its arguments are based on the note concerning the performance assessment and repeats that, in the circumstances, it could not envisage assigning him to another post. Although the probation period usually corresponds to the first two years of service, the initial appointment is for one year, at the end of which the employment relationship may be terminated. The defendant submits that it is for the complainant to prove breach of confidentiality, which he fails to do. It explains that the amount paid into his account corresponds to the compensation offered minus the amounts he received from 1 June to 4 September 1998.

Lastly, it objects to the receivability of the financial claim put forward by the complainant on the grounds that all the internal means of redress were not exhausted.

CONSIDERATIONS

1. The complainant was recruited by competition to serve as a Senior Programme and Administrative Support Officer (SPASO) at the ILO's Office in Dakar on 2 June 1998 under a three-month contract. He was given three additional within-grade steps in view of his former professional experience.

He was sent to the Regional Office at Abidjan for training and resumed his duties at the Dakar Office at the end of July.

2. On 31 August, the date on which the three-month contract expired, the Director of the Dakar Office informed him that his appointment would not be renewed and offered him an extension of contract from 1 to 4 September to allow him to "settle some matters still pending".

3. On 4 September the complainant submitted an internal complaint to the Director-General under Rule 9.1 of the Rules governing conditions of service of short-term officials, alleging "unjustifiable and unfair treatment" on the part of the Director of the Dakar Office.

4. In a memorandum of 7 December 1998, submitted during the internal procedure, he asked the Director-General "to declare [his] three-month contract null and void" and to replace it with a fixed-term contract for twelve months with retroactive effect from 1 June 1998, to reinstate him in his duties at the Dakar Office or, failing that, to assign him "elsewhere within the ILO at a grade equivalent to or higher than that of a SPASO -[grade] 3, wherever the ILO deems fit", to remove from his personal file any documents relating to the current proceedings and, lastly, to have the work certificate written by the Director of the Dakar Office corrected to take account of the complainant's comments.

5. By a letter of 9 April 1999 the Director of the Personnel Department told the complainant that in lieu of reinstatement, the Director-General had decided to offer him, in particular, compensation calculated on the basis of one year's pay and allowances as from 1 June 1998 (i.e. the length of the appointment he should initially have been offered) plus the amount of one year's contributions by the ILO to the United Nations Joint Staff Pension Fund and the Staff Health Insurance Fund, minus the amounts he had actually received under his contract of three months and four days. The total amount offered to the complainant was estimated at 20,250 dollars.

That is the decision challenged in this complaint.

6. The complainant seeks reinstatement within the ILO, "professional rehabilitation from an administrative point of view", financial compensation for moral and material injury, and reimbursement of costs.

7. The Tribunal notes that the ILO does not rebut the complainant's plea of injury. In view of the circumstances of his recruitment, he should have been put on a fixed-term appointment as from 1 June 1998. That was why, recognising that the Director of the Dakar Office broke the applicable rules, the Director-General decided to allow partially his internal complaint.

Since the complainant's entitlement to relief is not contested, the Tribunal need only determine what would constitute fair redress.

8. The complainant seeks reinstatement and "professional rehabilitation". Since he served the Organization for only three months and

four days as a locally-recruited official, ending in September 1998, and in view of the conflictual situation in which he was involved at the Dakar Office, the Tribunal considers that reinstatement in his post is not appropriate.

As for his claim to reinstatement elsewhere in the ILO, the Tribunal notes that this option is limited by the availability of posts and the interests of the Organization. The complainant fails to prove that any suitable posts were available and that his transfer could be envisaged in the ILO's interests.

The complainant's plea concerning his age fails as immaterial since the ILO has removed from its Staff Regulations the provision setting an age limit for recruitment. The document produced by the complainant indicates only a preference expressed by another organisation for candidates of under 55 years of age but sets no hard and fast rule.

9. Reinstatement being ruled out, all that needs to be determined is the amount to be awarded to the complainant as redress for injury.

The complainant seeks a fixed-term appointment of at least two years pursuant to the provisions of Articles 4.6(d) and 5.1 of the Staff Regulations. He asserts that the ILO's consistent practice is to give officials of his rank such appointments which are renewable by tacit agreement except in exceptional cases.

The material rules provide that:

Article 4.6(d)

> "Appointments for a fixed term shall be of not less than one year and of not more than five years ..."

Article 5.1(a)

> "An official appointed to a job other than of a temporary nature shall be on probation for the first two years following his appointment ..."

10. The Tribunal observes that, contrary to the complainant's assertion, nothing in the provisions cited above obliged the Organization to give him a tacitly renewable two-year appointment. Furthermore, the complainant adduces no evidence of the practice he cites.

Article 4.6(d) does allow the Organization to give fixed-term appointments for one year notwithstanding the fact that the period of compulsory probation is two years. The ILO was therefore right in its assertion that probationary appointments are initially for one year and may be renewed.

Only after the two-year probationary period may the ILO offer fixed-term appointments of more than one year. That is the intent of the texts cited above and it is confirmed by circular No. 574, series 6, of 21 August 1997.

11. The conclusion is that the complainant was not entitled, at his initial appointment, to a fixed-term contract of more than one year. The Director-General's decision not to renew his fixed-term contract does not interfere with any contractual right but merely disappoints expectation of further employment (see Judgment 1351, *in re* Li, under 13).

12. However, the unlawful decision of the Director of the Dakar Office to give the complainant a temporary appointment of three months in breach of the applicable rules, and the way in which the decision to end the employment relationship between the complainant and the ILO was implemented caused the complainant material and moral injury for which he is entitled to seek redress.

The Tribunal considers that the compensation for such injury should comprise the salary and allowances for the period from 1 July 1998 to 31 May 1999, and the amounts intended as redress for moral injury. Accordingly, the Tribunal considers that the sum of 16,000,000 CFA francs, minus all amounts already paid to the complainant, constitutes fair redress for injury under all heads.

13. The complainant is entitled to reimbursement of costs for the complaint before the Tribunal, which shall be set at 1,000,000 CFA francs.

DECISION

For the above reasons,

1. **The Director-General's decision notified on 9 April 1999 is set aside.**
2. **The ILO shall pay the complainant 16,000,000 CFA francs minus the amounts already paid, in accordance with 12 above.**
3. **It shall pay the complainant 1,000,000 CFA francs in costs.**
4. **The complainant's other claims are dismissed.**

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Serrière**

Judgment No. 1975

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Franck Serrière against the International Criminal Police Organization (Interpol) on 25 May 1999 and corrected on 29 June, Interpol's reply of 30 September, the complainant's rejoinder of 23 November 1999, the Organization's surrejoinder of 20 January 2000, the complainant's further submissions dated 28 February and Interpol's observations of 10 May 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French national who was born in 1968, entered the service of Interpol on 1 June 1990 as a security guard at grade 10 in the Security Sub-Division of the General Administration Division.

On 9 September 1998, while he was in the Security Centre, the complainant used a paperclip to block the reset button (marked "S22 Acquit") which clears the alarms of the anti-intrusion security system in the General Secretariat. The head of the team on duty that day, Mr P., noted the deactivation and, in a memorandum dated 15 September, reported the incident to the Deputy Head of the Security Group. In a meeting on

22 September with the Deputy Head of General and Social Affairs and the Deputy Head of the Security Group, the complainant admitted the facts and confirmed them in a note of the same day. Also on 22 September, the Deputy Head of the Security Group sent a memorandum to the Director of Administration and Finance requesting the instigation of a disciplinary procedure against the complainant. By a letter of 23 September, the Secretary General informed the complainant of his decision to suspend him from duty with pay as of that date and to refer the matter to the Joint Disciplinary Committee. In its report dated 23 November, that Committee's recommendation, supported by a majority of two of its members, was for a "transfer with downgrading", while the third member proposed "relegation by one step". By a letter of 30 November 1998, the Secretary General informed the complainant of his decision to dismiss him, with notice and termination indemnity. He told him his service would be terminated on 4 March 1999 after a three-month notice period beginning on 4 December 1998.

On 22 December, the complainant appealed against the above decision. In its report of 23 March 1999, the Joint Appeals Committee unanimously recommended the rejection of the appeal. By a letter of 26 March 1999, which is the impugned decision, the Secretary General informed the complainant that his appeal had been rejected.

B. In justification of his act, the complainant explains that the work performed by outside firms at the headquarters of the Organization regularly set off the alarms. On the day of the incident, the firm responsible for maintaining the gardens was using lawnmowers. The use of the lawnmowers and the sharpening of their blades in the basement were setting off the fire alarm, which gives a general evacuation order if an incident is not identified and resolved within a maximum of three minutes. Constant and keen attention and vigilance were therefore required. For this reason, the complainant deactivated the alarm recall buzzer, which did not prejudice the security system, since the mechanisms which set off and clear the alarm were still functioning. He adds that this deactivation was a frequent practice among the security guards.

The complainant contends that, for the sole purpose of making the facts seem more serious than they really were and in order to justify his dismissal, the initial complaint against him and the report containing the charges deliberately exaggerated and misrepresented them. Citing the conclusion of the Joint Disciplinary Committee, according to which "the button in question was only a simple *indicator*, of *secondary importance* in the alarm system", he says that the alarm was so far from being essential that it had not even been originally planned.

With regard to the examination of the case by the Joint Appeals Committee, the complainant makes three observations. First, it was improper that Mr P., the author of the memorandum of 15 September 1998, represent the Organization during the investigation organised by the Appeals Committee, since it was Mr P. who had made the unfounded accusations against him and was known to be hostile to him. Secondly, the procedure for clearing and resetting the alarms, which is constantly followed, was not described to the investigator of the Committee, who was thereby deliberately misled. Finally, the investigation was not adversarial and was undertaken unbeknown to the complainant. Furthermore, the employee who had assisted him before the Joint Disciplinary Committee was refused access to the site. The complainant asks the Tribunal to order a new investigation and to hear the official in question.

In support of his contention that the sanction imposed upon him is excessive, the complainant refers to the report of the Joint Disciplinary Committee in which the Committee chose, in view of the quality of his work, not to recommend his dismissal. He adds that not only is the above sanction unlawful, but it is all the more abusive in view of the circumstances in which it was imposed. He had to return his badge and was escorted to the exit door of the building in the presence of the whole staff. This was done in such haste that he did not undergo the medical examination on cessation of service provided for by Article 104 of the Staff Rules. In addition to unemployment, the fact that he was unable to find a job caused him substantial moral injury, which has since resulted in psychological problems.

The complainant asks the Tribunal to quash the decision of the Secretary General of 26 March 1999 and order his reinstatement; or, failing that, to find his dismissal unlawful and abusive and, as a consequence, to order the Organization to compensate him for the harm suffered; and to grant him damages totalling not less than 200,000 French francs.

C. The Organization replies that the complainant does not deny the facts, but endeavours to minimise their importance.

It states that because of the highly technical nature of the security system, the Joint Disciplinary Committee's report contained inaccuracies. Consequently, the Committee drew wrong conclusions about the small importance of the button which was unlawfully blocked by the complainant. In support of its argument, Interpol describes the alarm system in detail and the function of the button "S22 Acquit" which, in its view, demonstrates the full value of the button and the danger of unlawfully blocking it. It says that endeavouring to minimise the gravity of the fault by playing down the role of the button which the complainant blocked is not only irrelevant, but also unjustified, since the button in question, which is linked to a "buzzer", acts as an alarm.

Interpol argues that it is of no avail for the complainant to insist on challenging Mr P.'s evidence, because the impugned decision is not based on his evidence, but on an objective analysis of the fault which was committed.

It submits that the complainant's criticisms of the Joint Appeals Committee's examination of the case are unfounded: the technical aspects of the fault committed gave rise to a broad adversarial debate.

As for the proportionality of the sanction, Interpol relies firstly on the aggravating circumstances – the fact that the complainant had forgotten that he had blocked the "S22 Acquit" button – and, secondly, the existence of precedents, since on several occasions the complainant had been accused of not respecting security instructions which, among other measures, had resulted in his being given a written warning on 1 February 1996.

The Organization emphasises that it did indeed take into account the opinion of the Joint Disciplinary Committee in deciding to dismiss the complainant when it awarded him the termination indemnity and three months' notice.

Finally, Interpol contends that it was a mere oversight that the complainant did not undergo the medical examination required on cessation of service.

D. In his rejoinder the complainant challenges Interpol's presentation of the facts. In his view, both the report containing the charges and the procedure followed by the Joint Disciplinary Committee and then the Joint Appeals Committee were based on Mr P.'s evidence and his memorandum of 15 September 1998. He reaffirms that the procedure in these two Committees was not adversarial. Referring to the report of the Joint Disciplinary Committee he refutes the technical explanations provided by Interpol to assess the gravity of his conduct and to justify the sanction imposed. Finally, he reiterates that it was a frequent practice for security guards to deactivate the alarm recall buzzer.

E. In its surrejoinder Interpol considers that the complainant is contradicting himself by citing the recommendation of the Joint Disciplinary Committee in support of his pleas, while at the same time challenging the fact that he did not have an opportunity to be heard by that Committee. It points out that Mr P., in view of his hierarchical level, was not required to assess the gravity of the fault committed by the complainant and that he simply reported the facts. Interpol adds that it would be wrong to treat the complainant's claim that it was a constant practice to deactivate the alarms as mitigating circumstances.

F. In further submissions, the complainant indicates that in April 1999 two other officials of Interpol committed acts identical to those with which he is charged, but that no measures were taken against them.

G. In its final observations, Interpol states that disciplinary measures have been taken against the two officials mentioned by the complainant.

CONSIDERATIONS

1. The complainant, a security guard in the Security Sub-Division of the General Secretariat of Interpol, was dismissed with notice and termination indemnity by a decision of the Secretary General dated 30 November 1998. This decision was taken after consulting the Joint Disciplinary Committee and on the grounds of a serious fault committed by the complainant on 9 September 1998 when he artificially blocked the reset button which clears the alarms of the General Secretariat's anti-intrusion security system. The complainant appealed for the sanction to be reviewed but, by a decision of 26 March 1999, which followed the recommendation of the Joint Disciplinary Committee, the Secretary General rejected the appeal. The Tribunal has before it a receivable complaint seeking the quashing of that decision, the reinstatement of the complainant and compensation for the prejudice he suffered as a result of his dismissal which the complainant says was unlawful and abusive.

2. Before examining the complainant's pleas, the circumstances which led Interpol to initiate a disciplinary procedure against him should be recalled .

3. On 9 September 1998, the complainant was assigned to the Security Centre, where he was supervising all the security systems. Around 9 o'clock in the morning, after a lawnmower had repeatedly set off the alarms, he believed that he was justified in blocking the "S22 Acquit" reset button with a paperclip, thereby deactivating the recall buzzer. He left his post at around 10.30 a.m. without informing the head of the team who replaced him that the buzzer had been deactivated. The head of the team, noting the presence of the paperclip, reactivated the system and immediately phoned through to the complainant to tell him that he "should not have done that type of thing and that he should have made sure he had taken out the paperclip". It was only a few days later, on 15 September 1998, that the head of the team informed his supervisor about the incident. It appears that he revealed it because the complainant had told him that he should keep quiet about it, otherwise the supervisor would be informed that he slept while on duty in the Security Unit in the afternoons.

When he was informed of the incident, the Secretary General of Interpol decided to suspend the complainant and to initiate disciplinary proceedings against him. The report containing the charges, that was submitted to the Joint Disciplinary Committee emphasised that the artificial neutralisation of an alarm was against the procedures in force and was liable to interfere with the proper functioning of the security systems. It also revealed that the complainant had previously received several calls to order which he had ignored and that "the fact of having envisaged incriminating the head of the team to prevent him from informing his supervisor about the incident constituted suspect behaviour". The report concluded from the nature of the fault, aggravated by precedents, that the employee had committed serious professional misconduct for which a significant sanction should be imposed on him.

4. After a detailed investigation and many meetings, the members of the Joint Disciplinary Committee reached the unanimous opinion that the charges amounted to a disciplinary fault, in view of the complainant's serious failure to follow security instructions, his negligence in failing to inform the person who took over from him and his inability to justify fully that his action had resulted from overwork. However, the Committee admitted certain attenuating circumstances, and particularly the fact that the blocked button was only an indicator of secondary importance. It considered that the complainant should be given the benefit of the doubt with regard to his alleged "threats" intended to prevent one of his colleagues from reporting him.

In view of these elements, and despite their severe criticism concerning his "very irresponsible approach" and his "lack of professionalism betraying an absence of respect for security instructions and his failure to take his duties seriously", two members of the Joint Disciplinary Committee recommended that the fault committed by the complainant should be sanctioned by a transfer with downgrading while the third member recommended merely a relegation by one step. The Secretary General did not follow this recommendation. He considered in his decision of

30 November 1998 that the serious fault admitted by the Committee was unjustifiable and that the complainant's attitude demonstrated his incapacity to follow instructions, which was incompatible with him remaining in the service of Interpol. The Joint Appeals Committee found that the penalty imposed was not disproportionate in view of the charges against the complainant and that Interpol could no longer trust him or continue his engagement as a security guard. It therefore unanimously recommended the dismissal of the complainant's internal appeal. This recommendation was followed by the Secretary General, whose decision has been referred to the Tribunal.

5. The complainant has several pleas in support of his challenge. Firstly, he contends that the charges against him are incorrect and that Interpol deceived the Joint Appeals Committee after an investigation which was carried out in breach of the principle of adversarial process. Secondly, he submits that the sanction imposed is excessive and not proportionate to the charges against him, particularly since the quality of his work had been found to be satisfactory.

6. On the first point, the lengthy debates in the Committees to which the dispute was referred, as well as in the submissions to the Tribunal, concerning the actual security risks implied by the blockage of an alarm button which is only set off in the event of a new intrusion, in an area already signalled as "under attack", are not decisive. Yet it is still true that, as argued by Interpol, it is not for employees responsible for security to modify the functioning of the alarm systems disregarding the procedures in force. Employees responsible for ensuring the security of international organisations, especially when, like Interpol, they are located in sensitive sites, have a special duty to be vigilant and cannot set themselves up to judge the utility of any specific device. Moreover, the principle of adversarial process was not breached and the complainant had every opportunity to defend himself before the Joint Disciplinary Committee and the Joint Appeals Committee. If the latter delegated one of its members on

11 February 1999 to examine the functioning of the security system, of which the blocked "S22 Acquit" button forms part, it was with a view to understanding the technical debate which had arisen between Interpol and the complainant and to report back to the Committee. The findings are known to the complainant who challenges their value as proof, and there was no reason to conduct the investigation in the presence of the complainant or his adviser who had every opportunity to describe the manner in which the system operates and to challenge Interpol's arguments. No new adversarial inquiry is therefore necessary. Finally, although the complainant contends that it is improper for the employee who had reported the incident to be present during this inquiry and says that he made trumped up charges against him, the evidence shows that it was the employee's duty to report the incident and that his presence in the inquiry carried out by the Joint Appeals Committee was explained by the nature of his functions. Throughout the procedure, the complainant was able to put forward his arguments in his defence and there are no grounds for considering that the principle of adversarial process was not respected, nor that the charges made against the complainant were based on mistaken evidence. In this respect, it may be noted that Interpol withdrew its initial charge that the complainant had used threats against the employee who had discovered the neutralisation of the device to deter him from reporting the incident.

7. On the second plea, the Tribunal finds that the sanction imposed on the complainant, although severe, is not disproportionate. The case law has it (see, for example, Judgment 937, *in re* Fellhauer) that when disciplinary action against an employee is out of all proportion to the offence according to both objective and subjective criteria, there is a mistake of law which warrants setting the impugned decision aside. But in this case Interpol, which has to take special care in ensuring the observance of security rules, rightly considered that anyone found guilty of the flagrant and deliberate violation of the rules concerning the alarm systems cannot continue in its employment. Moreover, the evidence shows that the complainant had previously been the recipient of several remarks and calls

to order, as well as a warning, and that he should have been particularly careful to comply with the applicable rules. The complainant believes he can argue that the neutralisation of the buzzer was a common practice and cites cases in which acts similar to those with which he is charged were not punished. But these allegations, for which no proof is provided, are denied by Interpol. Moreover, the fact that other employees engaged in reprehensible practices for which, according to Interpol, disciplinary action was taken against them, does not diminish the complainant's disciplinary responsibility. Interpol's written submissions further show that when this alarm is to be deactivated in cases of breakdown or maintenance, a special procedure has to be followed. Not only did the complainant not report his neutralisation of the alarm, but he also omitted to inform the person who took over from him at the Security Centre. In the circumstances, the fault committed is sufficiently serious to justify dismissal with notice and termination indemnity, which is not the most serious penalty that could have been imposed. The plea of disproportionality must therefore fail and with it the claims for the decision to be set aside, and consequently for damages, since no flaw has been found in the conditions under which the decision was reached. The oversight by the Personnel Department, which omitted to carry out the statutory medical examination, does not affect the lawfulness of the impugned decision.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

***In re* Placci** **Judgment No. 1976**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Marlène Placci against the International Telecommunication Union (ITU) on 13 August 1999 and corrected on 30 August, the ITU's reply of 2 December 1999, the complainant's rejoinder of 28 January 2000 and the Union's surrejoinder of 10 March 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a British citizen born in 1947, joined the staff of the ITU in 1988 and was assigned as an administrative assistant to the Chief of the External Relations Department on post number 205. On 1 June 1990 she was given a permanent appointment and held grade G.6.

Following the retirement of the Chief of the Department, the Legal Adviser of the ITU took over the role of coordinator of the department for the first half of 1991. This led to additional duties for the complainant and the Union paid her a special post allowance at grade G.7 for that period. From February 1992 to 31 December 1996 it seconded her to the

Telecommunication Development Bureau as an administrative assistant at grade G.7. On 1 January 1997 she returned to post 205, at grade G.6, in her former department which had in the meantime become the Strategic Planning and External Affairs Unit.

The complainant wrote to the Secretary-General on 5 May 1997 asking that a job description be drawn up for her post. On 16 May 1997 the Head of External Affairs gave her a draft job description for her to consider. She submitted an alternative draft, but the matter was not finalised. The issue was taken up by the new head in mid-1998: on 6 July he asked her to submit a draft version of a job description. She did so on 8 July, but no final version was approved. In December 1998 he raised the possibility of her accepting a position in External Affairs at grade G.6, providing administrative assistance to an official at grade P.3 responsible for relations with member States, and on 11 December 1998 he sent her a copy of the relevant job description. She did not pursue that course of action.

On 17 December 1998 she sent a memorandum to the Secretary-General protesting that despite carrying out professional duties she had not had a job description for two years. In the absence of a job description, she asked for a special post allowance at the P.3 level for the two-year period from 1 January 1997 and expressed interest in being assigned to a Professional post.

On 12 January 1999 the ITU sent her a preliminary reply to that memorandum and on 1 February 1999 she submitted six appeals simultaneously to the Appeal Board. It heard her case and on 22 March 1999 issued two reports which the complainant received the following day. One covered her first appeal regarding her request for a job description. The second report covered her other five appeals which dealt respectively with: unfair treatment; unjust standards of conduct; lack of career prospects and unfair treatment; equitable assignment; and failure to convene a medical board in respect of a service-incurred injury she had sustained from a fall at work in 1992.

In its first report, the Board noted that there was a job description for post 205, but that it no longer corresponded to the actual tasks the job involved. It agreed that the absence of a relevant job description could lead to misunderstandings and had placed her in a frustrating situation. It recommended that a relevant job description should be drawn up for post 205. Her appeal included a claim to have her post classified at grade P.3. The Board said that in the absence of an up-to-date job description, it could not decide on the matter. In its second report, the Board considered that her claims in the other five appeals were irreceivable for failure to exhaust the internal remedies within the time limit required by the Staff Rule 11.1.1.2 a).

By a memorandum of 12 April 1999 the acting Head of External Affairs informed the complainant that she would be seconded to Corporate Communication section. The Chief of that section undertook to prepare an appropriate job description for her. On 13 August 1999 she filed this complaint with the Tribunal, challenging the implied rejection of her appeals.

B. The complainant contends that she has not had a relevant job description for almost eleven years and that even the Appeal Board's recommendation that she should receive one has not been followed up. Although the Union systematically denied her a job description, it nonetheless frequently expected her to carry out Professional level duties at a General Service grade.

She claims that she has been a victim of "mobbing" (professional harassment) and unfair treatment over a long period which the ITU did nothing to prevent, and that when she had requested a job description, she was transferred elsewhere or asked to perform new tasks.

Her supervisors adopted a discriminatory attitude towards her, delaying her promotion and denying her career opportunities, in spite of her taking a diploma in Business Administration to further her career. The ITU also ignored her requests for a reclassification of her post. Exposure to such humiliating situations had a serious effect on her health, leading to stress and depression.

She asks the Tribunal to order the ITU to: finalise a "relevant job description in line with current tasks being carried out ... at the Professional level"; carry out a job classification review to determine impartially the current grade of her post; draw up a "career path" for her; take appropriate steps to stop "mobbing" which "is detrimental to health"; comply with its

Regulations and Rules as well as with the "International Bill of Human Rights"; convene a medical board in respect of her service-incurred injury in 1992 so as to assess the degree of loss of function suffered since then; and award her an amount equal to 1,471,357 United States dollars "for damages, moral injury, costs and for all the prejudice sustained".

C. In its reply the ITU holds that although the complaint is not structured in the same form as the complainant's internal appeals, it is clear that she is seeking a ruling from the Tribunal on claims of which the majority were considered as irreceivable by the Appeal Board since they related to matters dating from previous years and she had failed to comply with the rules on time limits.

It invites the Tribunal to limit the scope of the present complaint to the matters relating to the possibility of updating her job description for post 205 subsequent to her return to the External Affairs Unit in January 1997.

There was a job description pertaining to post 205, and having previously occupied the post, the complainant was familiar with the duties it entailed. The description of the duties needed to be changed owing to changes in the Unit, but until it was revised, it remained valid and the level of the post corresponded to the complainant's own grade. At no stage in her career did it deny her a job description. She was not satisfied with the draft job descriptions her supervisors had given her in 1997 and in 1998 and her counter proposals had not been approved. Her main preoccupation, however, was the level at which her post was classified and hence her personal grade. The complainant repeatedly showed unwillingness to accept a job description which did not satisfy her desire to perform duties belonging to the Professional category. While her aspirations were legitimate, the ITU had to consider the needs of the organisation. In any event, the promotion to the Professional grade that she seeks can only be achieved by the procedures prescribed in the applicable rules. She is seeking to obtain a ruling from the Tribunal to the effect that a job description should be classified in the Professional category, but the Tribunal is not competent to make such a ruling. It has no competence to endorse a list of duties drawn up by the complainant, nor is it able to classify those duties.

Citing the case law, the ITU says that such a matter ultimately falls within the discretion of the Secretary-General.

The Union also submits that the complainant has produced no objective evidence to show that she has been a victim of moral or professional harassment. It views her claim for the convening of a medical board as being irreceivable in that she did not submit it to the Secretary-General before bringing it to the Appeal Board. For the same reason it rejects her claim for damages.

D. In her rejoinder, on the matter of the receivability of her claims, the complainant stresses that when she initially wrote to the Secretary-General on 17 December 1998 she covered all the matters which she later dealt with in her internal appeals, and that her appeals were therefore receivable. She maintains all her claims and enlarges on her pleas.

From comments which had been made to her verbally in 1997, she had deduced that while her supervisors seemed to be willing for her to perform professional tasks, they nevertheless made sure that her job description did not contain duties exceeding those assigned normally to staff on grade G.5 or G.6. In her view, this constituted a form of "unjust enrichment" on the part of the organisation as she was "underpaid" considering the level of tasks assigned to her. She emphasises that the job classification review which she is claiming should be "based on tasks she is actually performing".

She points out that although the ITU granted her a special post allowance for the first semester of 1991, it refused her request for a six-month extension of the allowance even though she continued to carry out the same duties. In so doing, it did not treat her fairly and did not act in good faith or treat her with dignity and respect.

Furthermore, she considers that a promise was made to her regarding the development of her career. As head of her department, the Chief of the Strategic Planning and External Affairs Unit had to fill in part of a form she had submitted in 1998 applying to go on an external training course in Business Administration. He had ticked the option of "training to take on new responsibilities" as the justification for the Unit's need for her to do the course; this had led her to assume that career development would follow.

E. In its surrejoinder the ITU contests the complainant's allegations of professional harassment. It has shown consideration towards her and has given her "opportunities to demonstrate her capabilities". It further asserts that it paid her the appropriate special post allowances when she assumed additional responsibilities. Successive supervisors of the complainant have sought to revise her job descriptions in consultation with her. She simply refused to accept job descriptions that were not at the Professional level. Indeed, a job description for the complainant was officially drawn up and approved by her supervisors in June 1999; but as on previous occasions, the complainant showed no wish to perform tasks that she regarded as being below the Professional level.

Although her former chief may have encouraged her to enrol in the training course, his encouragement cannot be construed as a promise that career development or access to a higher grade would necessarily follow.

CONSIDERATIONS

1. The complainant lodged this complaint with the Tribunal on 13 August 1999 on the grounds that she did not have a job description which adequately reflected the level of the tasks she was performing. In the complaint form she identifies the impugned decision as being an express final decision dated 20 May 1999. The file does not bear that out. It appears that the complaint was lodged on the basis that the appeal procedure within the ITU had been exhausted. The Union does not have any comments with regard to the receivability of the complaint under Article VII, paragraphs 2 and 3, of the Statute of the Tribunal.

2. The complainant has seven claims. She asks the Tribunal:

"- To order the ITU to finalise a relevant job description in line with current tasks being carried out by [the complainant] at the Professional level.
- To order that a job classification review impartially determines the current grade of the post.
- To order the ITU to organise and project for [the complainant] a 'career path'.
- To constrain the ITU to take appropriate measures to stop 'mobbing which is detrimental to health'.

- To order the ITU to comply with its Rules and Regulations as well as with the International Bill of Human Rights.
- To compel the ITU to convene a medical board in respect of the service incurred injury in order to determine the degree in loss of function as from 1992.
- To adjudge and order the ITU to pay to [the complainant], by way of compensation, an amount equal to US $1,471,357 for damages, moral injury, costs and for all of the prejudice sustained."

3. The Union objects to the receivability of any of the claims which were not properly before the Appeal Board in the internal appeal procedure.

4. The Tribunal holds that only the matters relating to her request for a job description and her claim to be regarded at the Professional level can be considered on the merits by the Tribunal. All of her other claims are irreceivable on the grounds of failure to observe the rules for internal complaints.

5. The Union submits that the dispute between the complainant and the organisation is concerned less with the existence of a job description for the posts in which she was placed than with the level at which her post was classified. It claims it has never refused to provide the complainant with a job description at any stage and there were many exchanges of correspondence which show that her supervisors endeavoured to prepare job descriptions in consultation with her. She refused, however, to accept any job description that did not satisfy her desire to perform duties at the Professional level. There is no provision in the staff regulations or rules under which the complainant could be promoted to a Professional grade unless she were chosen for an advertised vacancy as a result of a selection procedure or if her post were reclassified at a Professional grade, subject to the Appointment and Promotion Board finding that she has the necessary qualifications for employment at that level.

6. The relief claimed by the complainant is that the Union should finalise a job description for her "in line with current tasks being carried out ... at the Professional level". The complainant was reassigned in April 1999 and an official job description was established in June 1999. As regards her request that her current tasks be classified at the Professional level, this is

not within the competence of the Tribunal. The Tribunal has no power to direct that a particular job be classified at the Professional level.

7. The next five of the claims listed under 2 above are irreceivable on the grounds that the complainant has not exhausted the internal means of redress.

Her seventh and last claim concerns consequential relief stemming from those five claims, but since they are not receivable this claim too must fail. The complainant is therefore not entitled to succeed on any ground in this complaint.

8. The Tribunal endorses the view of the Appeal Board that it was abnormal for the Administration not to have established an up-to-date job description over a two-year period. Indeed, it is for the Administration to exercise its authority and to establish a job description in a timely fashion.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-NINTH SESSION

***In re* González-Montes (No. 2)** **Judgment No. 1977**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Herminio González-Montes against the International Atomic Energy Agency (IAEA) on 9 May 1999 and corrected on 17 June, the IAEA's reply of 29 September 1999, the complainant's rejoinder of 5 January 2000 and the Agency's surrejoinder of 31 March 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Spanish citizen who was born in 1941, entered the service of the IAEA in 1969. He was accused of defrauding the Agency on several occasions and was dismissed on grounds of serious misconduct on 5 August 1996. By Judgment 1763 (*in re* González-Montes), delivered on 9 July 1998, the Tribunal set aside that decision due to procedural flaws and sent the case back to the Agency for reconsideration.

By a letter of 6 August 1998, the Acting Director of the Division of Personnel informed the complainant that, in accordance with Judgment 1763, he was reinstated retroactively as from 5 August 1996, but that the Director General had decided to suspend him from duty with pay pending reconsideration of his case. After consulting the Staff Council, the Director General decided on 25 August 1998 to appoint an ad hoc Panel to reconsider the complainant's case. At the same time, revisions were made to the Administrative Manual of the Agency in order to prevent the breaches of due process, which were found by the Tribunal in Judgment 1763, from arising in future.

On 31 August, the Head of the Office of Internal Audit and Evaluation Support (hereinafter IA) requested the complainant's comments on a draft report of the investigation into the alleged faults of which he was accused. On 25 September, the complainant replied that, in his view, the supporting documents for the report had been collected "in an unfair and illegal manner", contrary to several provisions of the Administrative Manual, and that he was not prepared to make any comments in relation to the report as long as it still contained those documents.

The report of the investigation, dated 9 October 1998, found that the complainant had defrauded or attempted to defraud the Agency on several occasions between 1991 and 1995 and that he had made a substantial financial gain therefrom. On 3 November, the Acting Director General transmitted the report to the ad hoc Panel for a recommendation. By a letter of 20 November, the Secretary of the ad hoc Panel informed the complainant that the Panel intended to convene on 1 December and requested him to be present. The complainant sought and obtained a postponement of the date until 22 December, but finally informed the Secretary, by a letter of 18 December 1998, that he challenged the legality of the ad hoc Panel and therefore was not prepared to attend the meeting.

In its report of 22 January 1999, the ad hoc Panel recommended the Director General to dismiss the complainant for serious misconduct with immediate effect, without notice or termination indemnity, not to consider him for any future appointment with the Agency and to recover all payments made to which he was not entitled.

By a letter of 5 February 1999, which is the impugned decision, the Director of the Division of Personnel informed the complainant, on behalf of the Director General, that he was dismissed from service with immediate effect for serious misconduct, that no termination indemnity would be paid to him and that the Agency would recover all payments made to which he was not entitled. He would receive three months' pay in lieu of notice. On 11 February, the complainant wrote to the Director General requesting authorisation to appeal directly to the Tribunal without exhausting the internal means of redress. He also requested that the date of his dismissal be postponed until 8 February, the date on which he had received the letter from the Director of Personnel. On 16 February, the Director of Personnel replied that the Director General agreed to his requests. In a letter dated 11 March, the complainant requested the Director General to grant him the status of suspended employee pending the judgment of the Tribunal. On 22 April 1999, the Director of Personnel informed him that the Director General had rejected this request.

By a letter of 19 April 1999, the Director of Personnel had informed the complainant that, on the basis of the investigation report and the report of the ad hoc Panel, the sums he had wrongly received had been valued at 441,300 Austrian schillings plus 1,321 United States dollars. He invited the complainant to provide any documents on the basis of which this calculation might be adjusted, in the absence of which these amounts would be deducted from the payment of his final entitlements. On 29 April, the complainant replied that he was still not able to make any comments on the evidence presented against him for the same reasons stated in his letters in which he had refused to comment on the report of the investigation and to appear before the ad hoc Panel.

B. The complainant contends that the Agency never intended to reconsider his case and only sought to justify his dismissal.

He submits that the establishment of the ad hoc Panel by the Director General was a "grave procedural error", since the only competent body was the Joint Disciplinary Board. Judgment 1763 did not find the constitution of the Joint Disciplinary Board to be flawed in itself; it did, however, find serious fault with the roles played by both the Director of the Division of Personnel and by the Director of the Legal Division during the investigation and appeal process. The risk of these flaws being repeated had since been eliminated with the transfer of responsibility for conducting investigations to the Office of Internal Audit and Evaluation Support. With regard to the member of the ad hoc Panel who was supposed to have been nominated by the representatives of the staff, the complainant contends that the member had in effect been selected by the Administration to ensure that the initial decision to dismiss him was upheld. Furthermore, Rule 13.03.2 of the Staff Rules states that exceptions to these Rules may be made by the Director General, provided, notably, that any such exception is agreed to by the staff member directly affected. However, the complainant never agreed to the establishment of an ad hoc Panel to replace the Joint Disciplinary Board. He accuses the Director General of abuse of procedural means and abuse of authority by appointing the ad hoc Panel and considers that he was a victim of discrimination.

The complainant contends that any documents collected by the Director of the Division of Personnel during the initial investigation should have been stricken or declared void. The IA was not entitled to request his comments on these documents, but should have initiated his own independent investigation.

He repeats that he could not, under the conditions in which the procedure had been carried out, provide his comments or appear before the ad hoc Panel; however, as he has frequently recalled in his correspondence, he was prepared to cooperate if his objections concerning both the evidence gathered and the ad hoc Panel were taken into account, as there were many issues on which he would have liked to comment. The Administration did not give any reasons for the dismissal of his objections; in his view in doing so it prevented him from defending himself, and therefore it drew mistaken conclusions from the evidence.

The complainant states that he still has not received the payments due for his salary for the period August 1996 to September 1998. He requests that the impugned decision be set aside, that he be reinstated in the service of the Agency and awarded costs, and that his case be sent back to the IAEA for reconsideration.

C. In its reply the Agency submits that it could not entrust the reconsideration of the complainant's case to the Joint Disciplinary Board once again without disregarding Judgment 1763. It affirms that the third member of the ad hoc Panel was indeed selected by the staff representatives. Moreover, the decision to establish the Panel was taken on the basis of

Rule 10.02.2 and paragraph 2 of section 13, part II of the Administrative Manual. It did not therefore constitute an exception and Rule 13.03.2 was not applicable. Finally, halting the work of the Panel while awaiting the complainant's possible comments would only have delayed the reconsideration of his case.

The Agency observes that Judgment 1763 at no point has criticised the evidence collected and that the IA has verified its authenticity and reliability. There was therefore no reason not to take it into account. According to the Agency, the complainant had the opportunity to make comments both during the investigation and before the ad hoc Panel. He could have done so without prejudice to his right to challenge their legality before the Tribunal, but he refused to do so and cannot use that as a reason for challenging the decision. Moreover, the reasons for which his objections had been dismissed were known to him.

Finally, on the question of the payment of the salary due to him, the Agency argues that time was needed to settle the complainant's situation regarding the United Nations Joint Staff Pension Fund.

D. In his rejoinder the complainant accuses the Administration of having exerted pressure to influence the choice of the member of the ad hoc Panel representing the staff. The Agency was mistaken in its reply that the establishment of an ad hoc Panel was within the rights conferred upon the Director General, as the provisions which it cites are not applicable in cases where an appropriate body already exists. He reaffirms that he wished to make comments and expresses doubts that a reply to his objections would have greatly delayed the procedure. Finally, he denies having received a satisfactory explanation of the reasons why his objections had been dismissed.

With regard to the non-payment of the amounts due pursuant to Judgment 1763, the complainant accuses the IAEA of bad faith.

E. In its surrejoinder the Agency denies having exerted pressure to change the composition of the ad hoc Panel. It accuses the complainant of adopting dilatory tactics in order to extend his period of leave with pay for as long as possible, knowing that his dismissal was inevitable in view of the serious nature of the offences he had committed.

The IAEA reports that it was informed by the complainant, by a letter of 23 March 2000, of the manner in which he wished to receive the amounts still due and that their payment was being processed.

CONSIDERATIONS

1. In Judgment 1763 the Tribunal set aside a decision of the IAEA Director General to dismiss the complainant for serious misconduct. As can be seen from that judgment, the decision was based upon the Tribunal's view that two serious procedural errors had been committed by the Agency, namely:

(a) that the Director of the Division of Personnel who had been directly involved in the investigation of the allegations of misconduct against the complainant, had then sat as Chairman of the Joint Disciplinary Board which considered the evidence so obtained and recommended dismissal; and

(b) the Director of the Legal Division, who had been a member of the Joint Disciplinary Board, subsequently gave legal advice concerning the case to the Joint Appeals Board which was hearing the complainant's appeal against the decision to dismiss him.

The Tribunal found that the complainant had not proved any of the other allegations which he had made in support of his attack upon the impugned decision. It returned the matter to the Agency for reconsideration.

2. This case is the sequel to that judgment. Upon receipt of the remit ordered by the Tribunal, the Agency reinstated the complainant, suspended him indefinitely with pay, and initiated a new investigation, which was carried out this time, not by the Division of Personnel, but by the IA. The Director General also appointed an ad hoc Panel to fill the role previously played by the Joint Disciplinary Board and to recommend appropriate action to him in respect to the complainant's activities. The results of the investigation were duly communicated to the ad hoc Panel, which after deliberation, recommended to the Director General that the complainant be

dismissed for serious misconduct. By decision dated 5 February 1999, communicated to the complainant on 8 February 1999, the Director General decided that the complainant should be dismissed for serious misconduct. The Agency and the complainant agreed to waive the jurisdiction of the Joint Appeals Board so as to allow recourse directly to the Tribunal. It is the decision of 5 February that is under challenge.

3. An unusual feature of this case, the significance of which has apparently escaped the complainant, is that there is no contested issue of fact before the Tribunal. For reasons which will be discussed below, the complainant chose not to respond to the invitation issued to him by the Head of IA to comment upon the latter's draft investigation report or to submit any evidence or information to the IA. He has similarly refused to appear before the ad hoc Panel or to submit any evidence or information to it. In his submissions to the Tribunal, the complainant, while repeatedly asserting that he has facts and evidence to show that both the IA and the ad hoc Panel committed errors of fact and that the Agency has acted in bad faith and has attempted to use him as a "scapegoat" (allegations similar to those raised by the complainant in the proceedings leading to Judgment 1763), he has produced not a shred of evidence to support those assertions. The upshot is that unless the complainant is successful in his attack upon the constitution of, and procedure followed by, the ad hoc Panel, the facts as determined by the IA investigation and accepted by the ad hoc Panel's conclusions must be taken as established. These facts, very similar to those outlined in Judgment 1763, are that the complainant on several occasions filed claims and received reimbursement for duty travel in business class while he had in fact travelled in economy class, pocketing the difference. The claims were supported by business class flight coupons which had been obtained by the complainant, but which in fact had never been used, and on at least one occasion, by falsified flight coupons. There is no evidence to support the complainant's contention that this fraud was condoned or approved by the Agency and the complainant's elaborate attempts at concealment make such contention, in any event, wholly incredible. Similarly, his suggestion that his fraudulent practice was widespread amongst other Agency personnel, which is likewise not supported by any evidence at all, is wholly irrelevant: even

if all the Agency's officers had been defrauding it in the same manner as the complainant, that would constitute no excuse for him. Where several persons commit the same crime, the guilt of one is not lessened by that of the others.

4. In these circumstances, the complainant's request for a hearing is manifestly unjustified. The complainant has offered no evidence at any stage of the proceedings against him, therefore, such a hearing could not possibly add anything to the record before the Tribunal.

5. The complainant's arguments, though submitted repeatedly and at great length, may be quickly summarized and examined. He claims that the evidence considered by the IA had been collected in an unfair and illegal manner; he attacks both the constitution and the composition of the ad hoc Panel; he claims that the ad hoc Panel failed to give adequate, or indeed, any reasons for a critical part of its recommendation and he says that, in any event, the penalty imposed was disproportionate to the offence.

6. It is the complainant's opinion that the evidence submitted to the IA had been illegally and unfairly obtained, a fact which, in his eyes, justified his refusal to submit any of his own evidence to the IA investigation. He argues that because the Tribunal found in Judgment 1763 that the Director of the Division of Personnel should not have both collected evidence at the investigation stage and sat as Chairman of the Joint Disciplinary Board at the deliberative stage, the consequence must be that any evidence collected in that flawed process must be forever tainted; since the IA investigation report was based on much the same evidence as had gone into the report by the Division of Personnel two years earlier, the IA report is itself fundamentally flawed. The complainant is wrong. Judgment 1763 did not find that the investigation process was itself flawed but made it clear that the manner in which it had been carried out in part by a person who was also Chairman of the Joint Disciplinary Board vitiated the latter's deliberative functions. The evidence itself remained both admissible and relevant and as long as both the IA and the ad hoc Panel offered the complainant full opportunity to comment on and respond to it, which they did, the complainant has no legitimate grounds for objecting thereto.

7. As regards the constitution of the ad hoc Panel, the complainant's contention appears to be that since the Administrative Manual provides for the creation of a Joint Disciplinary Board to deal with such cases, this Board was the only competent body to which the Director General could refer the IA report. The relevant parts of Staff Rule 10.02.2 read as follows:

> "(A) The Director General shall establish one or more Personnel Advisory Panels with the object of advising him in matters relating to
>
> (4) The imposition of disciplinary measures;
>
> (B) The members of the Personnel Advisory Panels shall be appointed by the Director General after consultation with the Staff Council ..."

This text is broad enough to allow the Director General to create an additional Personnel Advisory Panel such as the ad hoc Panel appointed in this case, where it is thought necessary or advisable to do so. The Administrative Manual, at paragraph 2 of section 13, part II confirms this view:

> "The joint staff/management bodies, the terms of reference and composition of which are also listed in this Section, were established either under Article X of the Staff Regulations and Staff Rules and other relevant Rules, or by separate decision of the Director General ... the Director General may, in conformity with any prescribed procedures, establish additional joint staff/management bodies and abolish, modify the functions, or change the composition of the existing ones."

It was clearly advisable and, in the circumstances, necessary for the Director General to appoint an ad hoc Panel to deal with the complainant's case after it had been remitted to the Agency for reconsideration. The Joint Disciplinary Board which had heard the case in 1996 and decided it in a manner adverse to the complainant could not be expected to sit on the same case a second time. Indeed, if the solution of appointing an ad hoc Panel which was entirely independent of the original Joint Disciplinary Board had not been adopted, the complainant might have had a legitimate ground of complaint; as it is, he has none.

8. The complainant's argument with regard to the composition of the ad hoc Panel is equally without foundation. It is based on the fact that the Staff Council's original suggestion as to an appropriate person to serve on

the ad hoc Panel was later changed because of the unavailability of the person suggested. The change was duly approved by the members of the Staff Council. In any event, it is clear from the text of Rule 10.02.2 quoted above, that the role of the Staff Council in the appointment of members of Personnel Advisory Panels is simply that of consultation and not that of appointment. The evidence is clear that such consultation did take place in the present case.

9. The complainant asserts that the ad hoc Panel failed to give reasons for its opinion because it did not give a reasoned reply to his assertion that it had been improperly constituted. The argument is ill conceived. The obligation of a disciplinary body to give reasons for its opinions is limited to the disciplinary matters remitted to it. The reason is so that the person subjected to a disciplinary measure may know why a penalty is being imposed upon him and may, if he thinks appropriate, appeal against the decision. But an administrative body, such as the ad hoc Panel, has no power and hence no obligation to decide in any definitive way upon its own remit. Of course, it must listen attentively to any objections that are made to the effect that it is exceeding or is about to exceed its powers and must take a position on such objections by either continuing to act or changing its course of action. But in the final analysis, the decision as to whether such a body is acting within its powers or beyond them must lie elsewhere and a person in the complainant's position suffers no prejudice from its failure to give reasons for declining to accede to his objections. Where it was obliged to give reasons on the disciplinary question on which its advice was sought the ad hoc Panel did so in a full and thorough manner.

10. The complainant's contention that the penalty of dismissal was disproportionate to the offence is wholly without merit. He defrauded his employer of substantial sums of money in circumstances that left no room for doubt that he both knew what he was doing and knew that it was wrong. When his actions came under suspicion, he falsified documents in an attempt to justify himself. His actions fell far below the standards expected of any employee let alone the high standards required of an international civil servant. The penalty of dismissal was amply warranted.

11. Finally, neither of the complainant's pleas, to the effect that he has not received his full salary for the period between his first and second dismissals and that the Agency's claims against him are exaggerated, can succeed. The first is irreceivable, the complainant not having exhausted his internal means of redress; the second founders on the complainant's failure, noted above, to present any evidence at any stage to refute the Agency's claims.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

SEYDOU BA

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation
the French text alone
being authoritative

EIGHTY-NINTH SESSION

***In re* Bousquet (No. 3),**
Criqui (No. 2), Gourier (No. 2),
Skelly and Vollering (No. 16)

(Applications for execution)

Judgment No. 1978

THE ADMINISTRATIVE TRIBUNAL,

Considering the applications for execution of Judgment 1663 filed by Mr Karl Christian Bousquet, Mr Jean-Jacques Criqui, Mr Philippe André Gourier, Mrs Jacinta Skelly and Mr Johannes Petrus Geertruda Vollering on 16 June 1998 and corrected on 16 June 1999, the reply of 29 September from the European Patent Organisation (EPO), the rejoinder of 13 December from Mr Bousquet, Mr Criqui, Mr Gourier and Mrs Skelly plus the separate rejoinder of 23 December 1999 from Mr Vollering, the Organisation's surrejoinder of 25 February 2000, the further submissions from the complainants – Mr Vollering excepted – dated 11 April and the observations of the EPO of 27 April 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Considering the applications to intervene filed on 17 December 1999 by:

F. Blondel
F. Chambonet
G. Cousins-Van Steen
J.P. De Can
H. Dockhorn
C. Fournier
C. Ginoux
B.D. Granger
M. Ludi
G.H.J. Mollet
D. Salvador

Having examined the written submissions;

CONSIDERATIONS

1. The facts on which the present case is based are set out in Judgment 1663 (*in re* Bousquet No. 2 and others), delivered on 10 July 1997, to which reference is made.

The case may be summarised as follows. The European Patent Office, the EPO's secretariat, adopted a method in 1988 for the adjustment of pay taking into account the cost of living and the remuneration of international officials, using as a reference the pay rates of the "coordinated organisations". But for the pay due as from 1 July 1992, the Administrative Council applied other criteria, without however changing the method that it had selected. The result was that pay was lower than it would have been under the method in question. This gave rise to unease and discontent among EPO staff. To bring an end to the dispute, staff representatives and the Administration agreed on the text of a compromise settlement which involved concessions on both sides. By decision CA/D 4/96 of 8 March 1996 the Administrative Council approved the settlement, part of which included the payment of a lump sum. The recipients of salaries or pensions had to agree individually to the payment in question by signing an individual declaration, which the great majority of them did. However, Mr Bousquet, Mr Gourier and Mr Vollering, joined by twenty interveners, challenged the amount of the pay adjustment for the period from 1 July 1992 to 30 June 1994. They pursued their action through to the Tribunal which, in Judgment 1663, upheld their complaint in substance and found that, until the method had been changed, the EPO was bound by it and had to apply it.

The decisions taken by the Office in pursuance of this judgment gave rise to new challenges. The President of the Office took the view that the parties to the case which resulted in Judgment 1663, including the interveners, should be the only ones to benefit from it. However he also extended its benefits to employees who, without having been a party in the case, had nevertheless not signed the individual declaration consenting to the compromise settlement, and who were therefore not bound by its terms.

The complainants in the present case were all parties or interveners in that case, with the exception of Mr Criqui, who also benefited from Judgment 1663 by decision of the Administration.

In their complaint they request the Tribunal "to order the full and complete execution of Judgment 1663, in accordance with the law, and all consequent redress".

2. In view of the clear claims set out in the complaint and the manner in which it is presented by the complainants, the Tribunal will treat the complaint solely as an application for execution, even though certain claims go beyond such an application. There is all the more reason to do so as other complaints have been filed in which these matters have been raised.

3. The EPO argues that the complaint is time-barred because it was not filed within ninety days of the date on which the complainants were informed of the Office's decision concerning the execution of Judgment 1663, despite the fact that the complainants had first lodged an internal appeal against the decision within the time limits.

The case law has it that the exhaustion of all internal remedies is not necessary before filing an application for execution. However, the possibility of direct recourse to the Tribunal does not exclude first lodging an internal appeal (see Judgment 1887, *in re* Argos No. 3 and others, under 5, and the case law cited therein).

The application for execution is not therefore time-barred.

4. An application for execution may only address issues covered by the initial judgment, which carries the authority of *res judicata* (see Judgment 1887 above, under 8).

(a) In Judgment 1663, which carries the authority of *res judicata* only for the parties to the dispute (see Judgment 1935, *in re* Fabiani No. 4, under 4 to 6), the Tribunal ruled on a dispute between the complainants in the present case, including the interveners and the EPO. The complaint filed by Mr Criqui, who was not a party to the above case, is therefore irreceivable.

(b) The challenge in that case only related to the adjustment of pay for the periods from 1 July 1992 to 30 June 1993 and from 1 July 1993 to 30 June 1994. Matters relating to salaries for the period following this latter date were not at issue before the Tribunal.

Similarly, the question of whether to incorporate the adjustment in a "salary scale" did not arise with regard to the above two periods (see also Judgment 1933, *in re* Ousset, under 6). The question of knowing on what figures to base the calculation or payment of any future adjustment could have subsequently become an issue. This issue could still be resolved, if necessary, through another challenge. The Tribunal had even less reason to order the determination of a new salary scale since the great majority of employees had signed the individual declaration, which implied the fixing of a new salary scale for them.

5. The complainants allege procedural flaws in the execution by the EPO of Judgment 1663 under several heads:

(a) The Administrative Council, although competent to determine salary adjustments, was not consulted which is in violation of Article 33(2) b) of the European Patent Convention, Article 64(6) of the Service Regulations and Article 1 of the Implementing Rule for Article 64.

(b) The Administrative Council, although competent to determine new salary scales, was not invited to take a decision on this subject.

(c) Nor was the General Advisory Committee consulted (Article 38(3) of the Service Regulations).

The EPO refutes these allegations. It disproves the claim that the Administrative Council was not consulted: the Council decided on the matter at its 68th Session on 7 and 8 October 1997. The EPO did not consider it necessary to fix new salary scales given that a salary scale had already been established in accordance with the compromise settlement and that the determination of a further scale was not justified for a relatively low number of employees. The limited scope of Judgment 1663 was also the reason why the General Advisory Committee was not consulted again with regard to the adjustment to be paid to employees benefiting under that judgment.

6. (a) It is plain from the evidence that the Administrative Council was informed of the President's plans regarding the adjustments. The complainants do not deny this, but contend that the Administrative Council did not take a decision on this subject, as required by Article 64 of the Service Regulations.

There is no need to examine this issue further, since any absence of a decision by the Administrative Council does not prejudice the complainants. Indeed, the latter recognise that they "have never claimed to have suffered any prejudice for the period ... between 1 July 1992 and 30 December 1995".

(b) For the above reasons, any fixing of salary scales valid for the future would have gone beyond the strict execution of Judgment 1663. At that stage, the absence of a salary scale did not prejudice the complainants. Moreover, the EPO did not act unlawfully in not fixing a salary scale, as it would only have been applicable to the complainants (see Judgment 1933, under 6). The absence of a salary scale did not prevent those concerned from challenging the basis on which any future adjustment was determined.

(c) Nor did the execution of the judgment in the case of the complainants raise any problem of a general nature concerning the staff as a whole. It was therefore within the discretion of the Administration not to consult the General Advisory Committee (see Judgments 1398, *in re* Vollering No. 5, under 6; 1488, *in re* Schorsack, under 7 et seq.; 1618, *in re* Baillet No. 2 and others, under 8 et seq.; and 1897, *in re* Cervantes No. 4 and others, under 9).

The various allegations of procedural flaws are therefore unfounded.

7. On a pecuniary level, the complainants contend that the adjustments made by the EPO are unlawful.

(a) Without putting forward a specific claim for interest, they note that they were paid interest at the rate of 8 per cent, whereas previously a rate of 10 per cent applied. However, the decision to apply that rate is in conformity with current case law of the Tribunal which, since Judgment 1624 (*in re* Clements), generally applies a rate of 8 per cent to take into account trends in the financial market and the economic situation in the main countries concerned.

(b) The complainants are of the view that the benefits of Judgment 1663 should have been extended to the staff as a whole and that new salary scales applicable to all the staff should have been fixed.

However, for the reasons set out above, those issues were not dealt with by the judgment and the complainants have no *locus standi* to raise them here (see under 4(a) above).

(c) The complainants also allege that the health insurance contributions deducted by the EPO were too high. They explain that total health expenditure in a year does not vary as a function of the total wage bill. Indeed, if the total wage bill increases, the percentage of salary allocated to health expenditure diminishes. In the present case, they allege that the increase in the total wage bill resulting from the salary rises granted to the beneficiaries of Judgment 1663 should therefore have resulted in a slight reduction in the rate of their health insurance contributions.

The EPO does not contest as such the effects of the increase in the total wage bill on the level of health insurance contributions. However, it indicates that "this adjustment was carried out in March 1998 and was recorded on a supplementary pay slip received by the complainants", which it produces in its reply.

In their rejoinder the complainants argue that the adjustment did not cover the years 1992 to 1995 and say that the document produced by the Office only concerns the year 1996.

In its surrejoinder the EPO rebuts the complainants' plea. It explains as follows:

> "In practice, since the amounts to be refunded to each employee for each of the years 1992 to 1995 in pursuance of Judgment 1663 were between 1 and 2 DM, it was decided to add these amounts to the more significant sum (about 20 DM) due for the year 1996 (the year in which the sums resulting from the compromise

> settlement were paid). In 1998, the complainants therefore received all the amounts which were due to them for the period 1992-1996. The defendant provides ... details concerning the calculation of the percentage (0.0193 per cent) applied as indicated in the pay slip challenged by the complainants. It is clearly stated that this percentage is the aggregate of the percentages for the years 1992 to 1996. The complainants could have obtained these details directly from the Administration."

After they had received the surrejoinder, the complainants filed further submissions, but did not contest the EPO's statements on this point. Therefore, these facts are not now under challenge.

So the plea is devoid of merit and cannot succeed.

8. It follows that the applications for execution must fail in their entirety.

DECISION

For the above reasons,

The applications are dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

*Registry's translation
the French text alone
being authoritative*

EIGHTY-NINTH SESSION

***In re* Bousquet (No. 4) and others** **Judgment No. 1979**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr Karl Christian Bousquet, the fifth complaint filed by Mr Jean-Pierre Cervantes, the third complaints filed by Mr Jean-Jacques Criqui and Mr Philippe André Gourier, the second complaint filed by Mr Paul Richard Luckett, the sixth complaint filed by Mr Gaston Raths and the third complaints filed by Mr Alain René Pierre Rose and Mrs Barbara Schorsack against the European Patent Organisation (EPO) on 4 March 1999 and corrected on 16 June, the EPO's reply of 29 September, the complainants' rejoinder of 13 December 1999 and the Organisation's surrejoinder of 25 February 2000, the complainants further submission of 11 April and the EPO's further observations of 27 April 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Considering the applications to intervene filed by 2,266 EPO employees;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgment 1663 (*in re* Bousquet No. 2 and others) delivered on 10 July 1997 and Judgments 1931 (*in re* Baillet No. 3), 1932 (*in re* Vollering No. 17) and 1933 (*in re* Ousset) delivered on 3 February 2000.

In order to settle once and for all a dispute about the adjustment of the remuneration of staff at the European Patent Office, the EPO's secretariat, on 8 March 1996 the Administrative Council adopted decision CA/D 4/96. Among other things, that decision provided for the amendment of the salary adjustment procedure applicable from 1 July 1988 (decision CA/D 20/88) through the introduction of a single lump-sum payment for the period from 1 July 1992 to 31 December 1995, and the amendment of the basic salary scales with effect from 1 January 1996. The dispute nevertheless came before the Tribunal. It gave rise to Judgment 1663, in which the Tribunal concluded that there were no proper grounds for departing from the 1988 procedure.

After further consultations the President of the Office submitted the Office's analysis of Judgment 1663 to the Council in document CA/117/97 of 7 October 1997, with details of how the judgment would be implemented. Concerning the period after 31 December 1995 the President noted:

> "The new element introduced by [Judgment 1663] is that the level of remuneration which would have been reached at the end of 1995 had the 1992 and 1993 adjustments been made in accordance with the Tribunal's interpretation of the procedure would in some cases be higher than the one introduced on 1 January 1996."

Consequently, the Office considered that, for the period from 1 January 1996 to 30 June 1996, a "guarantee clause" should be applied to all staff whose pay would, as a result of the new scales introduced on 1 January 1996, be lower than that they would have received under the procedure previously in force. While not changing the scales officially introduced on 1 January 1996, the clause would provide for payment of compensation and would affect only staff serving in Germany.

By a decision, CA/D 10/97, of 5 December 1997 the Council amended decision CA/D 4/96 with effect from 1 January 1996. The amendment provided that for the above-mentioned staff the difference in the net monthly remuneration or pension in respect of the period from 1 January to 30 June 1996 would "be made up in the form of a compensation allowance". By decision CA/D 6/97 of 5 December 1997 the Council established that as from 1 July 1997 the basic salary scales would be drawn up in accordance with the adjustment procedure (decision CA/D 20/88) as amended by decision CA/D 4/96.

Consequently, on 19 December 1997 the complainants received two additional pay slips for November 1997, one for the period from January 1996 to June 1996 and the other for the period from July 1997 to November 1997. By letters of 17 March 1998 they each lodged two appeals with the President, subsequently registered under numbers 20/98 and 21/98, against each of the two additional pay slips. In their first appeals they argued that the compensation allowance was intended to offset the loss in salary resulting from the EPO's "failure to correct the salary scales adopted on 1 January 1996" and denied them "the benefit of regular scales and higher remuneration in the future". In their second appeals they asserted that the scales used to establish the amount of the pay adjustment for the period from 1 July 1996 to 30 June 1997 were "inaccurate". Therefore, the salary scales adopted as from 1 July were also "wrong". In both appeals they asked the President to grant them the fair remuneration they considered they were entitled to. By letters of 6 April 1998 the Director of Personnel Development informed them that the President could not allow their appeals and had referred the matter to the Appeals Committee for an opinion.

The Committee reported on 23 September 1998 on the two appeals. It found the adjustment procedure to be flawed and that the Administration had "omitted" the compensation allowance from the salary scales adopted at 1 January 1996. It recommended unanimously that the appeals should be allowed, that the complainants' remuneration should be recalculated as from 1 July 1996 in the light of its conclusions and that any resulting arrears of salary should be paid. By a letter of 10 December 1998, the impugned decision, the Director of Personnel Development informed the complainants that the President had decided to dismiss their appeals.

B. Citing the Committee's report, the complainants submit that the rejection of their two internal appeals is unlawful. Referring to appeals 20/98 – challenging the application to them of decision CA/D 10/97 – they observe that although the compensation allowance made their remuneration for the period from 1 January 1996 to 30 June 1996 equal to "the amount yielded by the adjustment method in force", the EPO failed to set scales at

1 January 1996 in accordance with the procedure laid down in decision CA/D 20/88. It set them arbitrarily and for considerations of pay policy, in breach of that procedure. They add that, by decision CA/D 10/97, the Office excluded the compensation allowance in adjusting basic salaries at 1 July 1996. That adjustment was based on the scales appended to decision CA/D 4/96 – which were wrong – and was therefore unlawful. There must be continuity in adjustments, each new one being based on the regular adjustment of the previous year.

Referring to appeals 21/98, challenging the application to them of decision CA/D 6/97, they submit that the unlawfulness of the adjustment of the salary scales applied as from 1 July 1996 automatically affected the adjustment of the scales of 1 July 1997 "by repercussion".

They ask the Tribunal to quash the President's decision of 10 December 1998 and to award them costs.

C. In its reply the EPO contends that the complaints are irreceivable *ratione temporis* in that they seek a review of the pay scales applied as from 1 January 1996 and 1 July 1996. Having been introduced in 1996 the scales could not be challenged in March 1998, the date on which the appeals at the origin of these complaints were filed. Neither the delivery of Judgment 1663 nor the payment of the compensation allowance can set off a new time limit for appeals against them. The complainants' claim to a review of the scale applied as from 1 July 1997 is irreceivable "by repercussion" since it is based on the allegedly unlawful scale of 1 July 1996 and does not challenge the adjustment percentage applied as from 1 July 1997. Citing Judgment 1713 (*in re* Carretta and others), the EPO contends that the complainants may not seek the establishment of new pay scales.

Furthermore, the complaints filed by Mr Cervantes, Mr Luckett, Mr Raths and Mrs Schorsack are also irreceivable because these complainants signed the individual declaration thereby undertaking not to file any new appeals other than those seeking proper application of the new procedure. But what they are challenging here is not the application of the new procedure but the procedure itself.

Lastly, the EPO points out that, in practice, the compensation payment concerned only staff serving in Germany. Consequently, the complaints of

Mr Cervantes, Mr Gourier and Mr Rosé, who were serving at The Hague in the first half of 1996, are irreceivable on this score too.

In subsidiary pleas it submits that the compensation allowance payment and the establishment of scales at 1 January 1996 were lawful. It was at the staff's request that the scales provided in CA/D 4/96 were applied as from 1 January 1996. Since those new scales were "restructured and realigned" on those of the Coordinated Organizations and the European Union, it would have been more relevant to introduce them as from 1 July 1996. Moreover, the procedure in force at 1 January 1996 allowed the scales to be adjusted as from 1 July 1996 at the earliest. The level of the realigned scales was only 0.2 per cent short of what the staff claimed. The EPO was not bound to establish new scales in executing Judgment 1663, and by opting for the compensation allowance and maintaining the scales introduced at 1 January 1996 it respected the complainants' rights and at the same time chose the solution which was the most easily implemented from an administrative standpoint. By challenging the introduction of the compensation allowance the complainants are in fact seeking "by repercussion" an increase in pay as from 1 July 1996 and for the future, though no such increase is due to them.

The EPO contends that the salary scales for the period from 1 July 1996 to 30 June 1997 were lawful. The procedure introduced by document CA/D 20/88 allowed for periodic review and revision. In carrying out such revisions, the Council was free to set a new level of remuneration, for example by comparison with that of the Coordinated Organizations, which is precisely what it did when it adopted the new scales. What the complainants aim to achieve from the so-called "principle of continuity" in pay adjustment would amount to denying the Council's competence to modify the scales.

Deeming that it has demonstrated the lawfulness of the scales applied as from 1 July 1996, the EPO considers that the scales at 1 July 1997 are also lawful.

D. In their rejoinder the complainants maintain that their complaints are receivable and citing the case law assert that they may "at any time" ask that the level of their remuneration be "in keeping with the principles they rely on". Although they signed the individual declaration they did not relinquish the benefit of the legally applicable procedure.

They press their pleas on the merits. Referring to appeals 20/98 they note that, in its reply, the Organisation failed to mention a "fundamental document" dated 7 November 1995, in which the President acknowledged that, should the Tribunal find in favour of the staff (in future Judgment 1663), the Office would have to correct retroactively the pay scales. Furthermore, when the comprise was reached, the President undertook to respect the adjustment procedure for five years. But he broke that commitment by deciding to introduce the compensation allowance. They concede that the Council is free to amend the adjustment procedure, but on condition that it observes the principles set by the Tribunal in Judgment 1663. Furthermore, the EPO cannot lawfully rely either on the "realignment" of staff pay in that it is not based on any decision by the Council nor on the 0.2 per cent difference in that it does not derive from proper application of the procedure in force.

Referring to appeals 21/98 the complainants challenge the level of the pay scales as from 1 July 1997 in that they were set on the basis of scales applying as from 1 July 1996 which were 1.2 per cent lower than the lawful level.

E. In its surrejoinder the Organisation submits a document from the Inter-Organisations Study Section on Salaries and Prices (IOS), which, it says, bears out the statistical data and the conclusions it drew from them. It contends that by assessing the difference between the scales applied at 1 July 1996 and those claimed as being 1.2 per cent and not 0.2 per cent, the complainants are attempting to consolidate for the future the benefit of the adjustments made in 1994 and 1995, whereas according to the Tribunal's interpretation in Judgment 1663, those adjustments were in breach of the applicable procedure. Besides, if the President had still been bound by the commitment entered into by his predecessor on 7 November 1995 *vis-à-vis* the whole staff, any compromise on pay – such as the one provided by decision CA/D 4/96 – would have been "superfluous".

It adds that, in Judgments 1931 and 1933 the Tribunal did not object to the principle of a compensation allowance and found that it was not necessary to set new general scales for the first six months of 1996. Furthermore, again in Judgment 1933, the Tribunal acknowledged that the Organisation was entitled to apply, as from 1 July 1996, "a new method, with new scales", for the reckoning and adjustment of salaries.

F. The complainants' further submission addresses the extent of the injury they allege. They submit that the IOS document said nothing of the EPO's technical explanations or the validity of the salary adjustment procedure selected by the Office as a basis for concluding that there was a 0.2 per cent difference. That being so, they consider that the EPO's interpretation of the statistical data and technical conclusions was not endorsed by the IOS.

G. In its observations, the EPO maintains that the IOS did bear out its conclusions and that the complainants' pleas are therefore "purely contrived".

CONSIDERATIONS

1. The facts that prompted this complaint are set out in Judgment 1663 (*in re* Bousquet No. 2 and others), delivered on 10 July 1997, to which reference is made.

In 1988 the European Patent Office adopted a method for working out pay adjustments taking account of the cost of living and the level of pay of international civil servants and using the rates applied by the "Coordinated Organizations" as a reference. However, for pay due as from 1 July 1992 the Administrative Council used other criteria though it did not amend the method. As a result, salaries were lower than they would have been had the method been applied. This created discontent and resentment among the staff of the Office. To put an end to the dispute, representatives of the staff and the Administration agreed on a compromise settlement – which meant concessions on both sides. The Administrative Council endorsed the proposed settlement on 8 March 1996 by adopting decision CA/D 4/96. In order to benefit under the compromise, those receiving a salary or pension had to sign individual declarations, which the vast majority of them did. However, Mr Bousquet, Mr Gourier and Mr Vollering – joined by twenty interveners – challenged the amount of the adjustment for the period from 1 July 1992 to 30 June 1994. In its judgment (No. 1663) on that case, the Tribunal largely found in their favour, deeming that so long as the method had not been changed, it was binding on its author and should be applied.

The decisions taken by the Office following that judgment were again contested.

In the present case the complainants, joined by many interveners (2,266), are challenging the salary scales (which serve as the basis for determining later adjustments) applied from 1 July 1996 and, consequently, from 1 July 1997. They submit that the amount of a "compensation allowance" granted to them for the period from 1 January to 30 June 1996 should be included in the scales introduced on 1 July 1996 and hence, indirectly, in subsequent scales.

It should be noted that, on the President's proposal the pay agreement concluded in early 1996 was reflected in a decision of the Administrative Council (CA/D 4/96), dated 8 March 1996, which amended the Implementing Rule to Article 64 of the Service Regulations, adopted in 1988 (CA/D 20/88), and endorsed a salary and pension adjustment in line with the agreement reached with the staff representatives that was to benefit officials who signed the individual declarations. The new implementing rule, entitled "Procedure for adjusting the remuneration of permanent employees of the European Patent Office, applicable with effect from 1 July 1988 (CA/D 20/88) and amended with effect from 1 July 1996 (CA/D 4/96)", provides that as a rule adjustments take effect from 1 July each year. Chapter VIII of the Rule, entitled "Special measures as of 1 January 1996", provides in Article 12 for the adjustment of basic salary scales. Article 13 of Chapter IX, entitled "Date of entry into force" says:

> "(1) The present procedure will enter into force on the date on which it is approved by the Administrative Council.
>
> (2) The provisions of Chapter VIII will take effect on 1 January 1996.
>
> (3) The provisions of Chapters I to VII will apply for the first time when the annual adjustment is made on 1 July 1996.
>
> (4) Notwithstanding Article 2, paragraph 2, of the present procedure, the adjustment as of 1 July 1996 will apply to the scales resulting from the special measures referred to in Article 12."

These provisions were widely publicised. They are referred to explicitly in the individual declaration, which the vast majority of the staff (99 per cent) signed, thus undertaking "neither to pursue any existing appeals, nor file any new ones relating hereto, given that his/her other rights, notably to correct application of the adjustment procedure in the future, are not thereby affected".

Following Judgment 1663, the President of the Office noted that some staff not covered by the judgment ran the risk of receiving less, for the period from 1 January to 30 June 1996, than the amounts that would have resulted from the application of the judgment. At the request of staff representatives he therefore proposed to the Administrative Council that they be paid an additional amount from 1 January 1996.

Since the adjustment agreed on in the pay agreement for 1996 was to take effect from 1 January 1996 – rather than 1 July as was the rule – the President proposed to the Council that the additional amounts granted for the first half of 1996 be termed "compensation allowance".

The Council therefore adopted a decision (CA/D 10/97) on 5 December 1997, which reads as follows:

> "Article 1
>
> The following addition shall be made to Article 12 of Annex I to decision CA/D 4/96
>
> '(7) In the event that the net monthly remuneration or pension resulting from the scales determined in paragraphs 1 to 5 above should, for persons who, during the period from 1 January 1996 to the date of entry into force of the present decision, were entitled to a remuneration or pension from the Office, prove to be less than that which would have resulted from the application of judgment No. 1663 of the Administrative Tribunal of the International Labour Organisation, the difference will be made up in the form of a compensatory payment in respect of the period from 1 January to 30 June 1996 calculated on the basis of the tables shown in Annex IV.
>
> (8) The amounts of the compensatory payment corresponding to the different components making up the remuneration will, for the calculation of the monthly compensation due and of the contributions to the social security and pension schemes, be treated in the same way as that element of the remuneration to which they relate.'

> Article 2
>
> Article 13, paragraph (4), of Annex I to decision CA/D 4/96 shall be amended to read as follows:
>
> 'Notwithstanding Article 2, paragraph 2, of the present procedure, the adjustment as of 1 July 1996 will apply to the scales resulting from the special measures referred to in Article 12, paragraphs 1 to 6.'
>
> Article 3
>
> This decision shall enter into force on 5 December 1997. It shall take effect as of 1 January 1996."

On the same day the Council adopted a decision (CA/D 6/97) on the adjustment of remuneration as of 1 July 1997.

The Organisation takes the view that the compensation allowance should not be added to the amounts in the scale used as a basis for the adjustments taking effect at 1 July 1996.

The complainants demur. They ask to have the compensation allowance included in the scale for July 1996 and, consequently, in the one for July 1997.

2. They ask the Tribunal to quash "the decision of the President of the Office, as notified by the letter of 10 December 1998 from the Director of Personnel Development, and to award full redress". They want a judgment which can be applied to "the whole of the staff". In their view, the compensation allowance should be included in the scale applying at 1 July 1996, to serve as a basis for subsequent adjustments.

3. The Organisation submits that the complaints are irreceivable, though it concedes that the internal appeals against the first individual decisions (additional pay slips concerning the adjustment for the periods from January 1996 to June 1996 and July 1997 to November 1997) were lodged in time. It contends that the complainants could and should have challenged in time the decisions fixing the scales, but they did not. Furthermore, for staff who did adhere to the compromise, the present complaint is contrary to the pay agreement that set the new scale introduced at 1 July 1996.

The complainants deny that their complaints are irreceivable. In order to appeal they had to await the first individual decisions. The pay agreement allowed them to challenge the application of the amended procedure; in their opinion, the latter should have taken account of the ruling of Judgment 1663, which they could invoke.

According to the case law, the complainants could properly challenge the first decision applying to them individually a general decision on pay (reflected in their pay slips). Whether they could, exceptionally, have attacked the general decision is immaterial. The complaints are not out of time.

The question of whether the complainants' arguments coincide with the terms of pay agreement – as it should now be understood – will be examined to the extent necessary in the discussion on the merits.

4. Consistent precedent holds that, since judgments carry the authority of *res judicata* only for the parties to a dispute (see Judgment 1935, *in re* Fabiani No. 4), complainants may not put forward claims for the whole staff, but only for themselves. The complaints are irreceivable insofar as they address the position of persons who are not parties to this suit.

5. Since the present case largely concerns the effects of Judgment 1663, it is worthwhile recalling the latter's salient points. For the period in question – from 1 July 1992 to 30 June 1994 – the Office took individual decisions applying a general decision on pay adjustment, which were inconsistent with the adjustment procedure it adopted in 1988 and which it was bound to apply for as long as it remained in force. Judgment 1663 (under 12) refers expressly to – and confirms – earlier precedents including Judgments 1419 (*in re* Meylan and others) and 1420 (*in re* Dekker and von der Lühe). According to those precedents, an organisation may change its methodology provided that it abides by general principles of law (see also Judgments 1912, *in re* Berthet No. 2 and others, under 13, 1913, *in re* Dauvergne and others, under 11, and the others cited therein).

It is therefore necessary to determine whether the Office properly amended its rules of "procedure", to use its own terminology, and whether it complied with general principles of law.

(a) It is common ground that, formally, the amendment to the procedure was decided by the competent body – the Administrative Council (Article 33(2)(b) of the European Patent Convention and Article 64 of the Service Regulations) and was applied from 1 July 1996, a date consistent with the previous procedure adopted in 1988.

(b) An organisation's decisions about pay are within its discretionary authority. The Tribunal will review them only if they show an error of fact or of law, overlook essential facts, show abuse of authority or draw clearly mistaken conclusions from the evidence.

The complainants put forward a number of arguments in support of their contention that the decision not to include the compensation payment was unlawful.

(c) In their submission, the procedure has not changed, so the 1988 procedure, which provides for continuity of adjustment on the basis of a scale that includes the previous remuneration, still applies.

That reasoning overlooks the amendments made to the procedure in 1996 and 1997, which provided for new basic scales and not an adjustment vis-à-vis the former situation. This is borne out by both the text of these decisions and their stated aim – "realignment" by comparison with remuneration in the European Union and Coordinated Organizations.

The plea fails.

(d) The complainants assert a right to continuity of adjustment.

The plea has no basis in law as the rules do not bar a change of method. Besides, staff have no perpetual right to a pay rise proportional to cost of living increases or the evolution of pay levels in a comparable sector (see Judgment 1912, under 19).

Of course, the Organisation may not impair acquired rights of its employees or take arbitrary decisions to their detriment. But it did neither: the amended scales were the subject of an agreement between the Office and its staff, to which the vast majority of officials subscribed; and the Administrative Council can not be taxed with abuse of authority for taking a policy decision to bring EPO remuneration into line with that of the European Union and the Coordinated Organizations.

(e) Here, as in the case in which staff who signed the individual declaration seek to benefit fully from the effects of Judgment 1663, the complainants cite the letter of 7 November 1995 whereby the former President told a staff representative, through the intermediary of the Director of Staff Development, that if the Tribunal found for the officials in question, the benefits of the judgment would be extended to all staff. However, for the reasons stated in Judgment 1980 (*in re* Cervantes No. 6 and others) also delivered this day, that promise was made in a different context; its conditions are no longer met, at least as concerns officials who signed individual declarations following the 1996 compromise settlement and the Council's subsequent decisions. Furthermore, Judgment 1663 concerns only the pay adjustment for the period from 1 July 1992 to 30 June 1994 and does not rule out a change of method provided that it is consistent with general principles of law. The complainants may not therefore infer a right to continuity of adjustment either as a general rule or in the context of 1996.

(f) The complainants refer to a statement in a document dated 15 February 1996 written at the time of the negotiations for the proposed pay settlement in which the President of the Office undertook "to maintain for the next five years the position thus reached regarding pay". They submit, in essence, that this commitment was misleading and not respected by the Office.

But they fail to prove their assertion. The commitments made under the pay agreement, to take effect at 1 January 1996, were met. The pay increase resulting from the agreement was also taken into consideration for the adjustment at 1 July 1996. The only change after Judgment 1663 was the increase granted by the Office – in the form of a compensation allowance for the period from 1 January to 30 June 1996. Even if that payment was not included in the scale used for subsequent adjustments, overall it undoubtedly benefited the staff concerned.

(g) According to the complainants, the new procedure should be applied with their own stipulations.

Their reasoning is unsound, particularly as the text, as amended, indicates clearly that the adjustment of July 1996 is to be based on the increases established in the pay agreement, excluding the compensation allowances granted for the first half of 1996.

(h) The rule against retroactivity prevents an organisation from applying retroactively to staff a rule which is unfavourable to them. In order to determine whether a measure is unfavourable its overall effects must be assessed. For the reasons given above, the compensation allowance was, overall, favourable to the officials concerned even if it was not to serve as a basis for subsequent adjustments.

There was no breach of the rule against retroactivity.

6. Since none of the pleas succeed, the complaints must be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Cervantes (No. 6),**
Luckett (No. 3), Raths (No. 7)
Rosé (No. 4) and Schorsack (No. 4)

Judgment No. 1980

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr Jean-Pierre Cervantes, the third complaint filed by Mr Paul Richard Luckett, the seventh complaint filed by Mr Gaston Raths and the fourth complaints filed by Mr Alain René Pierre Rosé and Mrs Barbara Schorsack against the European Patent Organisation (EPO) on 4 March 1999 and corrected on 16 June, the EPO's reply of 29 September, the complainants' rejoinder of 13 December 1999 and the Organisation's surrejoinder of 25 February 2000, the complainants' further submission dated 11 April and the EPO's observations of 27 April 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Considering the applications to intervene filed by 2,057 EPO employees;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out in Judgment 1663 (*in re* Bousquet No. 2 and others) delivered on 10 July 1997 and Judgments 1931 (*in re* Baillet No. 3), 1932 (*in re* Vollering No. 17) and 1933 (*in re* Ousset) delivered on 3 February 2000.

In order to settle once and for all a dispute about the adjustment of the remuneration of staff at the European Patent Office, the EPO's secretariat, on 8 March 1996 the Administrative Council adopted decision CA/D 4/96. Among other things, that decision provided for the amendment of the salary adjustment procedure applicable from 1 July 1988 (decision CA/D 20/88) through the introduction of a single lump-sum payment in respect of the period from 1 July 1992 to 31 December 1995, and by providing that Brussels would again become the "reference city" for reckoning parities in purchasing power, as from 1 July 1996. By the terms of Article 4 of decision CA/D 4/96, the payment of the lump sum was made "subject to the beneficiary's signing an individual declaration". The complainants in the present case all signed the declaration. The dispute nevertheless came before the Tribunal. It gave rise to Judgment 1663, in which the Tribunal concluded that there were no proper grounds for departing from the 1988 procedure. By communiqué No. 17 of 17 September 1997 the President of the Office informed all staff that Judgment 1663 would not apply to officials who had signed the declaration.

In a communiqué of 2 October 1997 the Staff Committee advised all members of the staff to fill up an appended letter appealing to the President to execute Judgment 1663 or else to treat the letter as a notice of internal appeal. In the *Gazette* of 10 November 1997 the Director of Personnel Development informed staff that the President had rejected the appeals and referred the matter to the Appeals Committee. The appeals were registered under No. 85/97.

In a document, CA/117/97, of 7 October 1997 on the implementation of Judgment 1663, the President sent the Office's analysis of the judgment to the Council. Referring to the period from July 1992 to December 1995, the Office said:

> "... as far as the complainants and intervening parties [in the case that led to Judgment 1663] are concerned, the Office will have to correct the salary adjustments made with effect from 1 July 1992 and 1 July 1993, and ... this correction will have to comprise keeping Brussels, not Munich as the reference city

> Correcting the adjustments for 1992 and 1993 will also 'automatically' mean that, for the persons involved, the remuneration due for the period July 1994 - December 1995 will have to be recalculated, since, even though they were not challenged, the adjustments made with effect from 1 July 1994 and 1 July 1995 will have to be made on the basis of the correction for 1992/93."

The Office concluded that Judgment 1663 should be applied to all persons who did not sign the declaration. At its 68th Session on 7 and 8 October 1997 the Council approved the measures envisaged for the period in question.

On 4 November 1997 the Administration explained to staff who were to benefit from Judgment 1663 the procedure for the calculations needed to implement it. Having signed the individual declaration and obtained the lump sum, the complainants received no additional payment. By letters of 4 February 1998 they each filed two appeals with the President challenging their pay slips for November 1997 as the first application to them individually of the President's decision of 17 September. In their first appeals, subsequently registered as No. 9/98, they objected to the exclusion from the benefit of Judgment 1663 of staff who had signed the declaration. In their second appeals, subsequently registered as No. 10/98, they alleged "improper execution" of the judgment. In both appeals they asked the President to quash the impugned decision and adjust their remuneration in line with the adjustments due at 1 July 1992, 1 July 1993, 1 July 1994 and 1 July 1995 in accordance with the principles set in Judgment 1663. In their second appeals they also sought rectification of the EPO's contribution to their pension and rectification of the amounts of their sickness insurance contributions in respect of the same adjustments. On lodging the two appeals, those of them who were parties to it withdrew from appeal 85/97. By individual letters of 18 March 1998 the Director of Personnel Development informed the complainants that the President could not allow their appeals and had referred the matter to the Appeals Committee.

In its report of 23 September 1998 on appeals 9/98 and 10/98, the Committee found that, in the light of Judgment 1663, different treatment of staff who had signed the declaration was unwarranted. It unanimously recommended that for the period from 1 July 1992 to 31 December 1995 the complainants' remuneration should be recalculated and that any resulting arrears should be paid to them. However, it rejected as irreceivable their claim to a recalculation of the basic salaries at 1 July 1994 and 1 July 1995. By a letter of 8 December 1998, the impugned decision, the Director of Personnel Development informed them that the President had decided to reject their appeals.

B. The complainants note that, for the period from 1 January 1992 to 31 December 1995, staff members who did not sign the declaration received salary increases of 4.1 per cent in 1992 and 6.3 per cent for 1993 to 1995. Those who did sign it got only the lump sum, in other words two to three times less than the amount received by their colleagues.

Citing the Appeals Committee's report they submit that the rejection of their two appeals is unlawful. Referring to appeals 9/98 they observe that the President failed to fulfil the commitment taken by his predecessor, which was notified to a member of the Staff Committee by the Director of Staff Development in a letter of 7 December 1995, to follow the "well-established practice" of extending to all staff any decisions taken as a result of a judgment of the Tribunal on an issue of general interest. Moreover, the Office's execution of Judgment 1663 was not strictly *inter partes* in that it extended the benefit of the judgment to staff who had not signed the declaration. The complainants also note that the Administration adjusted the pay of some fifty staff members for the period from 1 July 1992 to 31 December 1995 whereas Judgment 1663 covers only the period from 1 July 1992 to 30 June 1994.

Referring to appeals 10/98, they submit that the EPO broke the material rules. In their submission, for the period from 1 July 1992 to 31 December 1995 they are entitled to new scales established according to the rules and adopted by the competent authority following a proper procedure, insofar as they affect the establishment of regular scales as from 1 January 1996. Citing the case law, they explain that when the Tribunal sends a case back to it an organisation must take a new decision which complies not only with the wording and reasons of the judgment but also with the rules and procedures which it has itself set. Here, the EPO offended against Article 64 of the Service Regulations and the rules implementing it, which establish that authority in matters of remuneration is vested in the Council. Yet for the period from 1 July 1992 to 31 December 1995 the President failed to consult the Council. Consequently, the Office did not correct the old scales as Judgment 1663 required by implication and the complainants were denied the possibility of benefiting in the future from new adjustments based on salary scales adapted by the competent authority.

The complainants further submit that the calculation of amounts outstanding under the adjustment for the above-mentioned period was wrong. The rates applied to calculate their sickness insurance contributions deducted for that period were higher than they should have been, with the result that their pay was lower than that which Judgment 1663 entitled them to.

They ask the Tribunal to quash the President's decision of 8 December 1998 and to award them costs.

C. In its reply the Organisation submits that the complaints are irreceivable. By signing the individual declaration, the complainants undertook not to file any new appeals concerning the application of the adjustment procedure established in document CA/D 20/88. Besides, the Tribunal ordered the EPO to execute Judgment 1663 "in the complainants' and interveners' favour", but the present complainants were not parties to that case (*in re* Bousquet No. 2 and others). The EPO notes that some of their claims are new. They may not rely on Judgment 1663 to seek a review of the decisions that affected them in 1992, 1993, 1994 and 1995, since they must assume the consequences of opting for the compromise. Furthermore, appeals 9/98 and 10/98 are but a "prolongation" of appeals 85/97. Having withdrawn from the latter and reintroduced the same claim on 4 February 1998 the complainants are now out of time. Citing Judgment 1713 (*in re* Carretta and others), it submits that the complaints are irreceivable insofar as they claim the establishment of new pay scales.

In subsidiary arguments the EPO maintains that the rejection of the internal appeals was lawful. Referring to appeals 9/98 it asserts that Judgment 1663 does not invalidate the substance of the compromise accepted by the complainants. Furthermore, according to the principle that a judgment affects only the parties, Judgment 1663 did not apply to them. There was therefore no breach of equal treatment. When the former President undertook in November 1995 to apply future Judgment 1663 to the entire staff, circumstances were such that recourse to the Tribunal was the only way of settling the pay dispute. When the new President took office in January 1996, he started discussions with staff representatives in an attempt to settle it by compromise. And he succeeded in March 1996, thereby devoiding his predecessor's undertaking of substance. To argue that the staff who signed the compromise might have misunderstood the implications of so doing and retained the right to benefit from the judgment is sheer "bad faith". The Office extended the benefit of the judgment to officials who had not signed it because it considered they could rightly claim that the compromise should not affect their pay. Lastly, the execution of Judgment 1663 implied increasing the adjustments granted for the period from 1 July 1992 to 30 June 1994. The same applied, by "chain reaction" to the adjustments granted between 1 July 1994 and 31 December 1995.

Referring to appeals 10/98, the EPO points out that the measures envisaged for the execution of Judgment 1663 (contained in document CA/117/97) were submitted to and approved by the Council at its 68th Session. However, it concedes that it did not submit any adjusted salary scales to the Council, because it considered that the Tribunal's wording in Judgment 1663 allowed it to increase only the remuneration or pension received by the complainants and interveners, by applying rates from 1992 and over the other years at issue that would be appropriate according to the method upheld by the Tribunal in that judgment. It notes that the judgment establishes no new rights for the staff as a whole. As to the amounts deducted from remuneration in respect of sickness insurance, a "rectification" was made in March 1998 and reflected in an additional pay slip for the same month. It adds that the accumulated adjustment applied to the period from July 1992 to July 1996 was 0.2 per cent lower than the adjustment that would have resulted if the procedure of the Coordinated Organizations had been applied with Brussels as the reference city.

D. The complainants rejoin that their complaints are receivable and citing the case law assert that they may "at any time" ask that the level of their pay be "in keeping with the principles they rely on". In their submission, the provision in the individual declaration under which they undertook not to appeal included a reservation allowing them to appeal should their right to correct application of the adjustment procedure in the future be affected, as it is in the present case.

They press their pleas on the merits. Referring to appeals 9/98, they submit that Judgment 1663 "did invalidate the consequences of the compromise" in that it meant that the salary scales then at issue were unlawful and, according to them, implied the adoption of new scales which were lawful. They add that in the hierarchy of legal texts a judgment of the Tribunal ranks higher than an agreement and must take precedence in the event of any contradiction between the two. Furthermore, staff had every right to expect the EPO to keep its promise – namely the undertaking contained in the letter of 7 November 1995 – insofar as it took no express decision revoking it.

Referring to appeals 10/98, the complainants observe that the additional pay slip for March 1998 refers only to 1996, a year not at issue here, and proves that "nothing was done" for the years 1992 to 1995. The amount of the sickness insurance contributions paid by staff for those years, as well as pay adjustments they have received, were calculated on a wrong basis. As to the accumulated adjustment, they retort that it is meaningless if the scales taken as a basis were wrong, which was the case.

E. In its surrejoinder the EPO says that it inferred from Judgment 1931 that the Tribunal found the compromise to be valid. It observes that had the President still been bound by his predecessor's undertaking of 7 November 1995, any compromise would have been "superfluous". Nothing in Judgment 1663 indicated that all pay scales were to be recalculated. Besides, in Judgment 1933 the Tribunal recognised that the EPO had acted properly and ruled that the execution of Judgment 1663 could not affect pay scales applying from 1 July 1996. Lastly, the Organisation maintains that the pay adjustments it made during the period in question were only 0.2 per cent short of the level that would have been obtained taking Brussels as the reference city.

F. In their further submission the complainants contend that the injury they sustained is bound to be more than 0.2 per cent. They allege that in adjusting pay in 1994 and 1995 the EPO took decisions out of expediency and opportunism in order to reduce staff pay, in breach of a decision taken by Council in 1994.

G. In its observations the EPO rejects the arguments put forward in the complainants' further submission.

CONSIDERATIONS

1. The facts that prompted this complaint are set out in Judgment 1663 (*in re* Bousquet No. 2 and others), delivered on 10 July 1997, to which reference is made.

In 1988 the European Patent Office adopted a method for working out pay adjustments taking account of the cost of living and level of pay of international civil servants and using the rates applied by the "Coordinated Organizations" as a reference. However, for pay due as from 1 July 1992 the Administrative Council used other criteria though it did not amend the method. As a result, salaries were lower than they would have been had the method been applied. This created discontent and resentment among the staff of the Office. To put an end to the dispute, representatives of the staff and the Administration agreed on a compromise settlement – which meant concessions on both sides. The Administrative Council endorsed the compromise agreement on 8 March 1996 by adopting decision CA/D 4/96. In order to benefit from the compromise, staff had to sign individual declarations, and the vast majority did so. However, Mr Bousquet, Mr Gourier and Mr Vollering – joined by twenty interveners – challenged the amount of the adjustment for the period from 1 July 1992 to 30 June 1994. In its judgment (No. 1663) on that case, the Tribunal largely found in their favour, deeming that so long as the method had not been changed it was binding on its author and should be applied.

The decisions taken by the Office following that judgment were again contested. The President of the Office held that Judgment 1663 should apply only to the parties to the suit, including the interveners. He extended the benefit of the judgment to staff other than the parties provided that they had not signed the individual declaration whereby the compromise became binding.

The complainants – and the 2,057 interveners in the present complaint – accepted the compromise. They nonetheless asked to benefit retroactively from Judgment 1663 and claimed the adjustment of their remuneration under the adjustments due at 1 July 1992, 1 July 1993, 1 July 1994 and 1 July 1995. To that end, they challenged the decision setting their salary (pay slips of November 1997) when their colleagues who benefited from Judgment 1663 obtained a compensation allowance. They claimed that they too were entitled to the compensation allowance at the time. Their claim was dismissed and their internal appeals were declared to be devoid of merit, despite a favourable recommendation from the Appeals Committee.

2. The complainants assert that they are entitled to the same treatment as staff who benefited from Judgment 1663. They contend that they have a right to the same compensatory payment and to repayment of the amounts they paid in excess in respect of contributions to the pension fund and sickness insurance scheme.

In support of their claims they put forward the following arguments. The Office was bound to treat staff equally since equal treatment is a right. Judgment 1663, which clarified the position in law, takes precedence over the compromise. Inequality in remuneration is unacceptable. In this connection they cite a letter of 7 November 1995, which was to have been communicated to staff, in which the Director of Staff Development, on behalf of the former President had assured all EPO officials that they would be allowed the benefit of a favourable judgment by the Tribunal even if they had not been parties to the procedure. Since that promise had never been revoked, it must also apply to the effects of Judgment 1663; at any rate they could so interpret it in all good faith. It had always been the Office's practice to extend the effects of a judgment of the Tribunal to all staff. Indeed, the Administration itself extended the effects of Judgment 1663: for one thing, it applied the judgment to the period after 30 June 1994 – up to 31 December 1995 – and for another, it allowed staff who had not been parties to the process, i.e. who had not agreed to the compromise, to benefit from it. So it would be only fair to extend it to all the staff.

The complainants further submit that the Office failed to execute Judgment 1663 properly, because it failed to set new scales which included the adjustments and which would serve as a basis for subsequent adjustments. That was contrary to a number of judgments in which the Tribunal has sent the case back to the organisation ordering it to take new decisions by recalculating pay scales in accordance with its rules. The complainants also allege formal flaws in the execution of Judgment 1663.

3. The Organisation asks the Tribunal to dismiss the complaints as irreceivable and, subsidiarily, devoid of merit. On receivability, it argues that the compromise was binding. Staff who agreed to it undertook to withdraw any appeals pending and not to file any new ones relating to it. Furthermore, the complainants may not ask to benefit from Judgment 1663 since they were not parties to that suit and the judgment does not state that it is to be extended to all staff. Besides those claims were not submitted at the time, so in the context of an application for execution they are new and therefore irreceivable. The complaints are also time-barred because the internal appeals were not filed within the time limit that started to run from the decision setting the pay adjustment for the period in question, namely the first pay slip applying the decision to the complainants. The complaints are also irreceivable insofar as some complainants previously withdrew an appeal on the same issue when they agreed to the compromise.

On the merits, the Organisation asserts that the complainants' pleas are irrelevant. Judgment 1663 conferred no right on them. The compromise remains valid and the Office never undertook to extend the effects of Judgment 1663 to all staff. The letter of 7 November 1995, which was written before the compromise, addressed another situation and the text of the declarations of adherence to the compromise excludes any subsequent appeal against it. The EPO did observe the staff's right to equal treatment: those who signed the compromise were not in the same position of fact and law as those who appealed. The disparity in pay ended on 1 January 1996 since when all staff have been remunerated on the same basis. Furthermore, the extension of the effects of Judgment 1663 to staff who had not agreed to the compromise yet did not intervene in the appeal procedure, can be explained by the fact that they were not bound by the compromise and that, not having signed the individual declaration they may have thought that the letter of 7 November 1995 applied to them; consequently, they did not benefit from any advantage that the complainants could claim. As to the effects of Judgment 1663, which were favourable to the complainants in that procedure, until the end of 1995 they stemmed simply from the "repercussion" effect of the increases granted for the previous period and until the new pay scales came into force.

The Organisation denies formal flaws in the execution of Judgment 1663.

4. The issues of receivability will be taken up as necessary in the discussion of the merits.

5. The complainants contend that Judgment 1663 was not properly executed.

According to a general principle, a judgment ordinarily affects only the parties to the suit and applies only to the issues raised in it. The Tribunal has applied that principle in judgments concerning monetary claims by staff members of organisations (see Judgment 1935, *in re* Fabiani (No. 4), under 4 to 6).

The complainants were not parties to the proceedings that led to Judgment 1663 and so are not entitled to benefit from it unless they can invoke some special ground.

6. The complainants cite the letter of 7 November 1995, from which they infer that the Office undertook to extend its effects to all those entitled to benefit from the judgment.

That argument is at odds with the evidence. The letter of 7 November 1995 and the undertaking it contains go back to a period when most of the staff were in dispute with the Organisation about the calculation of the pay adjustment. Negotiations were under way and the purpose of the letter was to avoid staff having to initiate appeal proceedings. The situation changed with the arrival of the new President of the Office, on 1 January 1996. At the time the Appeals Committee suggested a collective arrangement. Negotiations between the Administration and staff representatives resulted in a compromise agreement which was to be approved by the Administrative

Council and to which staff were to adhere individually. The modalities of the agreement were approved by the Council in its decision of 8 March 1996 (CA/D 4/96), Article 4 of which says:

> "Payment of the lump sums ... shall be subject to the beneficiary's signing an individual declaration conforming with the specimen attached as Annex III. This declaration shall be presented to the beneficiary within 15 days from the date of [this] decision. Except in the case of *force majeure*, signing must occur within three months of the date of the present decision."

The text of the individual declaration says that:

> "signatory (1) below undertakes to pay ... the lump sum provided for in Article 3 of said decision, which signatory (2) accepts unreservedly and in final settlement.
>
> As a consequence of this transaction:
>
> - all litigation and claims arising from application of the adjustment procedure under CA/D 20/88 – with the exception of any concerning the specific indicator – are regarded as settled and mutually agreed upon;
> - signatory (2) undertakes neither to pursue any existing appeals, nor to file any new ones, relating hereto, given that his/her other rights, notably to correct application of the adjustment procedure in the future, are not thereby affected."

This arrangement has all the characteristics of an extra-judicial transaction, that is to say a contract whereby the parties end a dispute about a right or its scope by making concessions with the aim of ending or avoiding litigation. Since it is intended as a substitute for a judgment, a transaction may not ordinarily be contested on grounds of a mistake made by one or other of the parties regarding the scope of the right in question.

Nearly 99 per cent of the staff adhered to the compromise, which, for the parties concerned, put an end to litigation pending and precluded any future litigation on the adjustment of pay for the period in question.

Clearly, the letter of 7 November 1995 did not envisage the eventuality of a settlement by transaction between the staff concerned and the Office.

7. The compromise and its effects call for the following remarks.

(a) It is clear from the text of the Council's decision and of the individual declaration that the compromise did not require the agreement of all staff in order to be valid, since it took effect only when the declaration was signed by individual staff members.

(b) The text of the compromise sets no reservations for the eventuality of one or more staff members declining to sign it and obtaining a more favourable decision from the Tribunal. Since such an eventuality could not be excluded at the time when the compromise was concluded, it must be inferred that the parties wanted no reservations placed on the definitive nature of the compromise. This is clearly borne out by the categorical terms of the individual declaration ("in final settlement", withdrawal of existing appeals and undertaking not to file any new ones on the same issue).

(c) Nor does the principle that an administration must comply with its own rules affect the validity of the compromise. Although Article 64(1) of the Service Regulations states that a permanent employee may not "waive his entitlement" to remuneration, the text was amended by decision CA/D 4/96 which states that "this provision shall not invalidate the individual declaration concerning decision CA/D 4/96".

Furthermore, the complainants accepted the compromise so their position in law is different from that of their colleagues. They have no grounds for pleading breach of equal treatment.

8. It cannot be alleged that the Organisation undertook by implication to extend to all staff the effects of a more favourable judgment by the Tribunal. If there was such an extension in the past, the nature of the compromise allowed the Office to refuse extension without exceeding its discretionary authority.

9. They say that they were mistaken as to their position in law at the time of signing the compromise, but that their mistake was clarified by Judgment 1663 (see 6 above). But those are not receivable grounds for seeking rescission or review of the compromise.

10. Having no *locus standi* to apply for the execution of Judgment 1663, the complainants cannot plead that the execution of the judgment was formally flawed.

11. The conclusion is that the complaints are devoid of merit.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

EIGHTY-NINTH SESSION

***In re* O'Reilly** **Judgment No. 1981**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Eithne O'Reilly against the World Health Organization (WHO) on 7 July 1999, the WHO's reply of 11 October, the complainant's rejoinder of 26 October 1999 and the Organization's surrejoinder of 25 January 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is of Irish nationality, joined the staff of the WHO in 1983. In August 1988 the Organization assigned her to a post of secretary at grade G.4 in its Global Programme on AIDS (GPA) and she held several fixed-term appointments. In November 1994 her appointment was extended for two years. The Organization informed her in September 1995 that her appointment would end on 31 December 1995 due to the abolition of her post. She opted to go on leave without pay and on 12 December the Administration sent her a letter setting out the conditions governing such leave. She signed the letter and was placed on leave from 1 January 1996. Since January 1997 she has held short-term contracts.

In Judgments 1624 to 1631 of 10 July 1997, the Tribunal allowed complaints filed by former employees of the GPA against decisions to end their appointments because of the abolition of their posts at the end of 1995. In a letter of 20 October 1997 the Director of the Division of Personnel informed the complainant that prior to the issuing of those judgments the Administration had decided that any ruling made by the Tribunal with respect to one former GPA staff member would apply to other former GPA staff members "with the same claim and fact situation". She therefore submitted a claim on 18 November 1997 and the reduction-in-force procedure was applied to her.

By the terms of paragraph 24 of Judgments 1624 to 1631 each complainant was "entitled to reinstatement with payment of salary and allowances and benefits due under his contract less any indemnity or earnings he may have received or receive until either his appointment is terminated after completion of the reduction-in-force procedure or he is redeployed under that procedure". Paragraph 25 offered the Organization the alternative option of paying each complainant "damages equal to the amounts payable under [paragraph] 24" – without reinstating the complainant – and of carrying out the same reduction-in-force exercise.

The Director of Personnel informed the complainant in a letter of 27 April 1998 that the Organization had not found a post for her and that it would pay her damages in accordance with the ruling in the above-mentioned judgments. In a letter of 1 October 1998 the Administration sent her the calculation of the amount she would receive in damages for the period from 1 January 1996 to 27 July 1998. The sum was composed of salary and interest, less any occupational earnings received during that period.

By a memorandum of 9 October 1998 the complainant asked that the termination indemnity for abolition of post paid to her under Staff Rule 1050.4 be recalculated to take account of her longer length of service, as she was assuming her appointment had "subsisted up to the date of its termination following the reduction-in-force procedure". She asked to be paid the additional amount due to her. The Organization rejected her request saying that as it had not reinstated her, no service time had continued to accrue.

On 23 November 1998 she appealed to the Headquarters Board of Appeal against that decision. In its report of 23 March 1999 the Board was of the opinion that terminal benefits should be included in the sum payable under paragraph 24 of the GPA judgments, and that the complainant should have been allowed to accrue service time up to 27 July 1998, as the period in question was regarded as service time for staff who were reinstated. By denying the complainant that opportunity the Administration was introducing bias in the way it executed the Tribunal's judgments, to the disadvantage of staff who were not reinstated. It recommended paying her additional compensation "to cover the loss of terminal indemnity for the period 1 January 1996 to 27 July 1998". The Director-General did not concur with the Board's reasoning and on 7 June 1999 rejected her appeal, which is the decision the complainant is now impugning.

B. The complainant contends that the period from 1 January 1996 to 27 July 1998 should count as service time for her. The indemnity for abolition of post which she received under Staff Rule 1050.4 was calculated on her length of service up to the end of 1995 and should be recalculated accordingly. The redress listed in paragraph 24 of the above-mentioned judgments of the Tribunal included "benefits due under [a complainant's] contract". As was agreed by the Headquarters Board of Appeal, the termination indemnity constituted such a benefit. By not paying her the additional amount due, the Organization has disregarded the terms of the said judgments.

Citing the Tribunal's case law the complainant says that the Organization showed inconsistency in what it allowed as service time. It refuses to regard the period between her original illegal termination and her termination after the end of the reduction-in-force procedure as service time for her, but considered it as such for other GPA complainants; it calculated the damages due to them on the remuneration they would have received had their appointments continued for that period, even allowing them within-grade increments and increases due under revisions of the salary scale.

The complainant puts forward arguments to show that her employment relationship with the Organization continued up to 1998. According to the applicable rules, notice of termination may be given only on the completion of a reduction-in-force procedure, and so in her case it was the letter dated 27 April 1998 from the Director of Personnel which must have constituted such notice.

She asks the Tribunal to order the WHO to recalculate the indemnity due under Staff Rule 1050.4 in order to take into account her additional service time from 1 January 1996 to 27 July 1998 and to pay her the extra amount due. She also claims 4,000 Swiss francs in costs.

C. In its reply the Organization says that it correctly implemented its undertaking to allow the complainant the benefit of the previous GPA judgments. It was under no obligation to adjust the complainant's terminal indemnities. They were correctly calculated for a period of service ending on 31 December 1995. After that date the complainant was on leave without pay, in lieu of termination, and service time had ceased to accrue. She was aware of that fact. By signing the letter of 12 December 1995 she had accepted the conditions governing her leave without pay. One of the conditions specified that separation payments would be calculated in accordance with service credits accumulated "on the day before the effective date of leave ... without pay".

Point 2 of the Tribunal's ruling in Judgments 1624 to 1631 allowed the Organization the option of reinstating each complainant or paying damages. In applying that ruling to the present complainant it elected to pay her damages instead of reinstating her, and in so doing assumed that service time had ceased to accrue from 1 January 1996. The Organization calculated the damages due to the complainant in accordance with paragraph 24 which did not require a recalculation of terminal indemnities. It paid the complainant an amount equal to the salary, allowances and benefits she would have received had she been under a contract through to the unsuccessful outcome of the reduction-in-force procedure. That payment included a sum equivalent to three months' notice, but that did not imply that she had remained a staff member.

The complainant was not right in thinking that her employment relationship subsisted until the end of the reduction-in-force procedure. It was not necessary to have staff member status to participate in that process.

The Organization refutes the allegation that it showed inconsistency in determining what amounts to include when paying damages. It made the payments that were relevant and implemented the judgments in good faith.

D. In her rejoinder the complainant presses her pleas. She notes that while the Organization does not contest that termination benefit is "due under her contract" it seeks to show that it made payments to her pursuant to paragraph 25 rather than 24. She claims there is no basis in the GPA judgments for drawing a distinction between the two and it is paragraph 24 which determined what damages should be paid to her.

She reiterates her view that the Organization has shown inconsistency in treating the contested period as one of service time for some purposes, but not for others. There are no grounds in the judgments for "picking and choosing" which entitlements are due under a staff member's contract.

The complainant maintains that by virtue of the notification she was sent on 27 April 1998, at the close of the reduction-in-force exercise, her appointment came to an end on 27 July 1998. Citing the case law she refutes the Organization's view that participation in such an exercise did not indicate the subsistence of the employment relationship and maintains that because her initial notice of termination was invalid her contract was renewed by implication.

In her submissions to the Headquarters Board of Appeal she argued that the leave-without-pay agreements applying to other GPA complainants were superseded by the Tribunal's ruling setting aside their notices of termination. In its report on her case, the Board held the view that when the complainant had signed the leave-without-pay agreement contained in the letter of 12 December 1995, she could not have foreseen the Tribunal's judgments; the Board concluded that the agreement she had signed had become without effect.

E. In its surrejoinder the Organization observes that in the complainant's case, effective separation took place at the end of her leave without pay on 1 January 1997. From 31 December 1995 her service time – and hence her separation payments – ceased to accrue, in accordance with the terms of the leave-without-pay agreement that she had signed. There is no foundation for the complainant's assumption that it showed inconsistency with regard to service time. In calculating damages, the Organization did – when relevant – include amounts corresponding to normal within-grade increases, salary revisions and allowances.

It holds that there is a distinction to be drawn between paragraphs 24 and 25 of the GPA judgments inasmuch as paragraph 24 dealt with sums payable to staff on reinstatement. Payments were made to them as though separation had not occurred, and separation payments had to be returned. Under paragraph 25 the Organization could elect to pay damages instead of reinstating a staff member. It was assumed that separation had taken place, and, as was the case for the complainant, termination indemnity did not have to be returned.

CONSIDERATIONS

1. The complainant, who was assigned to the Global Programme on Aids (GPA) in 1988, was informed in 1995 that the post she was occupying would be abolished and that her appointment would come to an end on 31 December 1995 unless she was reassigned before that date. She was not redeployed. She neither appealed against termination nor applied to intervene in any of the complaints filed with the Tribunal by former GPA staff members, and which led to Judgments 1624 to 1631. She was nevertheless given the benefit of those judgments and was included in the reduction-in-force procedure which ensued, but was not successful.

2. The Organization opted to pay the complainant damages under paragraph 25 of Judgments 1624 to 1631. It paid her 69,787.14 Swiss francs equivalent to the sum she would have received under a contract (less occupational earnings) for the period from 1 January 1996 to 27 July 1998 plus interest until November 1998. She claims that in addition to those payments she is entitled to recalculation of the termination indemnity which she received at the time of her separation pursuant to Staff Rule 1050.4 as the period from 1 January 1996 to 27 July 1998 should be treated as service time.

3. Following her separation from service on 31 December 1995 the complainant was, at her request, placed on leave without pay for six months; it was later extended to 31 December 1996. Since her separation she has been offered short-term appointments.

4. In its report of 23 March 1999 the Headquarters Board of Appeal recommended the payment of additional compensation to cover loss of termination indemnity for the period from 1 January 1996 to 27 July 1998, plus a sum for costs.

5. The Director-General stated in a letter dated 7 June 1999, which is the decision impugned, that she did not agree with the Board's recommendation. She held that the payment of damages referred to in paragraph 25 of the GPA judgments was made in lieu of reinstatement on the assumption that separation had taken place; accordingly, the payment of damages did not include compensation for the additional termination indemnity the complainant was seeking and which depended on service time. The Director-General indicated that this position was consistent with the ruling of the Tribunal in Judgment 1797 (*in re* Weiss No. 2).

6. The complainant argues that there is no basis in the GPA judgments for the Organization in reckoning service time to differentiate between the rights of former GPA staff members who were reinstated and those who were not. She says that in calculating damages for GPA staff members, the Organization has in fact treated the period from the original "illegal" termination up to termination following the reduction-in-force procedure as service time. For staff who were not reinstated at the end of it, the Organization included the whole period as service time in allowing them the benefit of within-grade salary increases, changes in salary scales, education grants etc. She claims that Judgment 1797 is of no direct relevance since the complainant in that case sought reinstatement in the pension fund and the staff health insurance scheme, which she does not.

7. The Organization says that in the present case it exercised the option of paying the complainant damages in lieu of reinstatement. She was separated from service as from 1 January 1997 – at the end of her leave

without pay. However, the date that matters for the calculation of termination indemnities is 31 December 1995 because after that date service time ceased to accrue, including for the purpose of calculating separation payments. This was explained to the complainant in a letter dated 12 December 1995: she gave her agreement thereto by signing that letter on 18 December 1995. When the WHO opted to pay damages this was in lieu of reinstatement on the assumption that separation had already taken place; service time would only have accrued if she had actually been reinstated.

8. The Tribunal ruled in Judgment 1797 that the complainant in that case was not reinstated in employment. He too was included in the reduction-in-force exercise and was not successful. Since she was not reinstated the complainant is in a similar position.

9. The issue is therefore whether service time continued to accrue. The answer is that it did not accrue, since the Organization opted to pay damages in lieu of reinstatement. As there was no reinstatement, service time did not occur. Participation in the reduction-in-force exercise or payment of an amount equal to a sum equivalent to three months' notice does not mean that reinstatement occurred. The claims therefore fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

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INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-NINTH SESSION

***In re* Barret (No. 3)**

Judgment No. 1982

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr Christian Barret against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 3 August 1999 and corrected on 30 August, Eurocontrol's reply of 3 December 1999, the complainant's rejoinder of 15 March 2000, the observations submitted by Mr L. on 21 March and the Agency's surrejoinder of 3 May 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French citizen born in 1950, joined Eurocontrol on 1 June 1984 as an expert. He was promoted to grade A5 with effect from 1 April 1994.

On 13 November 1995 he applied for the post of Head of Bureau GS.4 (Internal Services) at grade A4, for which the notice of competition had been published on 27 September with the number HQ-95-AA/148. His candidacy was rejected by a letter of 30 November on the grounds that he had not completed the two years in the A5 grade required by the notice. On 8 December 1995, the Director General decided not to continue with the competition as he was about to reorganise the Directorate of the General Secretariat, in which Bureau GS.4 was located. The new structure was published on 15 March 1996.

By a decision of the Director General dated 16 April 1996, Mr L., an expert at grade A5, was called upon to occupy *ad interim* the function of Head of Bureau GS.4 with effect from 1 April 1996. On 27 June, the complainant addressed an internal complaint to the Director General against the "decision" not to publish a new notice of competition and the appointment *ad interim* of Mr L. On 6 November 1996, the Director of Human Resources referred the internal complaint to the Joint Committee for Disputes, although the latter did not issue an opinion.

By a decision of 3 March 1997, the Director General interrupted the *ad interim* appointment of Mr L. as of 1 April in accordance with Article 8 of the Staff Regulations governing officials of the Eurocontrol Agency, which provides that temporary postings shall be restricted to one year. He indicated that a separate decision would determine the functions of Mr L. from that date. According to the complainant, Mr L. nevertheless remained Head of Bureau GS.4, while the Agency claims that this function was henceforth assumed by the Director of the General Secretariat himself and that Mr L. returned to his functions as expert at grade A5 within the Bureau. Contrary to what had been announced, no decision was made indicating Mr L.'s new functions.

On 30 June 1997 the Agency published a new notice of competition with the number HQ-97-AA/016 for the post of Head of Bureau GS.4 ("Logistics and Support Services" as it is now called). The complainant applied on 11 August. The Selection Board reviewed the applications on 21 November 1997. The complainant was placed in the second group, while Mr L. was placed in the first group with another internal candidate. The latter withdrew and only Mr L. was called for an interview. His candidacy was submitted to the ad hoc Promotion Board, which met on 20 January 1998. The recommendation to promote Mr L. was issued on 28 January. By a decision of 3 February the Director General promoted the latter to grade A4 and appointed him to the post as from 1 February 1998.

On 3 March 1998 the complainant submitted a new internal complaint to the Director General seeking the quashing of the above decision for abuse of authority, abuse of process, "substantive flaws", formal flaws, the absence of a reasoned report of the Selection Board, failure to compare the respective merits of the candidates and failure to state the reasons for the rejection of his application. On 16 March, the Director of Human Resources informed him that his application had been rejected. The Selection Board issued a reasoned report on 20 March. In its opinion dated 7 July the Joint Committee for Disputes unanimously recommended the Director General to uphold the internal complaint due to the insufficient information provided to the complainant concerning the rejection of his application and the absence of a reasoned report of the Selection Board before the appointment of the selected candidate. By a letter of 28 July the Director of Human Resources informed the complainant that the Director General was cancelling the appointment of Mr L. By two decisions of 31 July 1998 with retroactive effect from 1 June, the Director of Human Resources, on behalf of the Director General, cancelled the decision to appoint Mr L. and called upon him to occupy *ad interim* the function of Head of Bureau GS.4.

On 9 September the ad hoc Promotion Board recommended Mr L.'s promotion to grade A4 with a view to filling the post of Head of Bureau GS.4. By decisions of 15 September, with effect from 1 October, the Director General brought to an end the temporary appointment of Mr L. and promoted him to the post.

On 14 December 1998 the complainant lodged an internal complaint. On 25 January 1999 the Director of Human Resources informed him that the ad hoc Promotion Board had decided not to recommend him for the above post. On 26 January he sent the complainant a note recalling the procedure which had been followed. In its opinion dated 21 April the Joint Committee for Disputes unanimously recommended the rejection of the internal complaint, but also proposed the award of "some form of financial or other compensation", in view of the "perfectly understandable feeling of frustration" which had arisen in the complainant as a result of the "slowness and lack of administrative rigour ... of the procedure". By a letter of 4 May 1999, which is the impugned decision, the Director of Human Resources rejected the internal complaint on behalf of the Director General.

B. The complainant submits that the note of 26 January 1999 summarising the procedure (hereinafter the summary note) shows that the Selection Board did not meet again after the cancellation of the results of the first competition and that the Director General therefore used the Board's opinion of 20 March 1998, which was unlawful, as a basis for the appointment of Mr L.

He challenges the lawfulness of failing to publish the vacancy notice immediately after the announcement concerning the reorganisation of the Directorate of the General Secretariat on 15 March 1996. The delay in publishing the notice was unlawful insofar as it had been justified by the need to try out the new organisation of the Directorate, since the structure of Bureau GS.4 had not been fundamentally modified. He adds that the successive temporary appointments of Mr L. – including the "*ad interim* appointment in practice" that he held from April 1997 to January 1998 – were unlawful because they violated Article 8 of the Staff Regulations and were intended to enable Mr L. to meet the requirements of the post, which constitutes abuse of authority.

The complainant alleges inequality of treatment on the grounds that, even though he had also been put by the Selection Board on the list of suitable candidates, he was not called for an interview by the Promotion Board. Subsidiarily, he contends that the Agency was obviously mistaken in its assessment of his and Mr L.'s professional qualifications.

The complainant requests that the decisions to promote Mr L., to reject his own application and to dismiss his internal complaint be set aside. He seeks awards of 1,500,000 Belgian francs in moral and material damages caused by the "unlawful nature of the impugned decisions" and, subsidiarily, of 500,000 francs for moral damages as a result of the manner in which the administrative procedures were carried out. He also claims costs.

C. In its reply the Agency argues that the complaint is not receivable insofar as it challenges the "non-publication of the vacancy notice after 15 March 1996 and the temporary nominations" of Mr L. Since the complainant did not pursue his internal complaint dated 27 June 1996, which in any event was irreceivable for lack of any act which injured him, he is time-barred from resubmitting the claims and the pleas set out in his internal complaint.

On the merits the Agency explains that the summary note of 26 January 1999 was "unfortunately incomplete", which "leads the complainant to draw mistaken conclusions". The Agency states that the Selection Board met once again on 30 July 1998 and issued a reasoned report, which it produces as evidence to its reply. It rejects the allegation of abuse of authority, which it says is not proven by the complainant. It denies inequality of treatment since the complainant, even though included on the list drawn up by the Selection Board, had been classified in the second group by order of merit; there was therefore no obligation to call him for an interview if one of the candidates in the first group met the requirements of the post. Finally, enumerating Mr L.'s qualifications and professional experience, it denies any glaring error in assessing the merits of the candidates.

In subsidiary argument, it submits that the Director General has broad discretionary powers to decide upon the publication of vacancy notices at the time he feels appropriate. Contrary to what the complainant claims, Bureau GS.4 was substantially reorganised. It denies that Mr L. had been given successive temporary appointments: after holding the post *ad interim* for one year, he returned to his duties as an expert. He received his second temporary appointment under different circumstances and there was no "*ad interim* appointment in practice" in the meantime.

D. In his rejoinder the complainant presses his plea that the procedure was unlawful. He says that, in his internal complaint of 27 June 1996, he reserved the right to seek the cancellation of any decision to appoint Mr L. definitively as a result of his temporary appointments, on the grounds that it was this recent experience which enabled Mr L. to win the competition.

The complainant produces documents issued by Mr L. after 1 April 1997, the date on which his first interim appointment officially ended, explicitly indicating him as acting Head of Bureau GS.4. He points to anomalies in the report of the Selection Board dated 30 July 1998, produced by the Agency in its reply, and says that it is a reworked version of the initial report, to which two pages have been added to remedy the failure to provide reasons. He casts doubt on whether the Selection Board met again and calls for the production of the original report of 30 July 1998 and for the members of the Board to be heard. He contends that the rules in force placed an obligation on the Agency, in the context of the final selection procedure, to interview all the candidates included on the list drawn up by the Selection Board and compare their merits, irrespective of their position on the list. He argues that the qualifications described in the Agency's reply to justify the appointment of Mr L. are different from the conditions required in the notice of competition and from the reasons given previously, which demonstrates that the assessment was flawed.

The complainant re-evaluates at 2,000,000 Belgian francs the moral and material injury resulting from the unlawful decisions which he is challenging.

E. In his observations Mr L. argues that the complainant's views on his professional skills are irrelevant and that there can be no doubt on his aptitude to fill the post of Head of Bureau GS.4, since two successive Selection Boards placed him first on their lists. He requests compensation for any injury caused in the event that his appointment is set aside, since he accepted it in good faith.

F. In its surrejoinder the Agency admits that, in view of the evidence produced by the complainant, it "has to make some changes to its presentation of the facts in its reply". It explains that the temporary appointment of Mr L. to the post of Head of Bureau GS.4 did indeed come to an end on 1 April 1997, but that in his capacity as the highest graded expert in the Bureau he was "*de facto*" in the situation of "acting Head", which "had no impact on the lawfulness ... of the procedure which was recommenced to fill" the post in question and does not correspond to successive temporary appointments. Eurocontrol also corrects its reply as to the date on which the Selection Board met: it met on 29 July 1998 to draw up the report dated 30 July. The Agency argues, however, that the anomalies in the report, and other errors which it attributes to the computer system, are neither as important nor as significant as the complainant claims.

The Agency presses its objections to the receivability of several of the claims. It submits that it was only in the interest of the service that it entrusted the challenged interim appointment to Mr L., and this did not constitute abuse of authority. The Selection Board's classification of the candidates by order of merit would be misdirected if the Agency then had to compare the merits of all the persons on the list of suitable candidates.

CONSIDERATIONS

1. The complainant joined Eurocontrol in June 1984 and was appointed expert at grade A7 in the Personnel Directorate (later called the Human Resources Directorate) at headquarters in Brussels. He was promoted to grade A6 in July 1988 and to grade A5 in April 1994. He remained in the same Directorate.

On 27 September 1995 the Agency published a notice of competition with the reference HQ-95-AA/148 with a view to filling the post of Head of Bureau GS.4 in the Directorate of the General Secretariat at grade A4. The notice of competition indicated that internal candidates at grade A5 had to have completed at least two years in that grade. The final date for applications was 27 November. The complainant applied for the post, and was rejected by letter on 30 November 1995 on the grounds that he did not meet the requirement respecting seniority in the grade. However, the Director General decided on 8 December 1995 not to continue the competition procedure. These decisions were not challenged.

On 15 March 1996 the Director General published the new structure of the Directorate of the General Secretariat.

On 16 April, at the request of the Director of the General Secretariat, the Director General appointed Mr L. *ad interim* Head of Bureau GS.4 at grade A4 with effect from 1 April 1996. Starting from 1 July, the differential allowance provided for in Article 8 of the Staff Regulations was paid to him.

On 27 June the complainant lodged an internal complaint to the Director General against the "decision" not to publish a new notice of competition and the temporary appointment of Mr L. to the post with a differential allowance. On 6 November 1996 the internal complaint was referred to the Joint Committee for Disputes, which did not issue an opinion. The case was not followed up.

By a decision of 3 March 1997 the Director General put an end to the temporary appointment of Mr L. as of 1 April 1997, in accordance with Article 8 of the Staff Regulations. The Agency says that Mr L. returned to his functions as expert at grade A5 in Bureau GS.4. However, this is refuted by the complainant, who contends that Mr L. in practice continued to discharge the functions of *ad interim* Head of the Bureau.

On 30 June 1997 a new notice of competition for the post of Head of Bureau GS.4 was published with the reference HQ-97-AA/016.

On 11 August the complainant applied for the post.

The Selection Board examined the nine applications which had been received. Seven candidates were recognised as being suitable and classified according to their merits in four groups. Mr L. and another candidate were placed in the first group, the complainant and a fourth candidate in the second group, and all the other candidates in groups 3 and 4. On 1 December 1997 the other candidate in the first group withdrew his application. The only remaining candidate in the first group, Mr L., was interviewed and his candidacy was submitted to the ad hoc Promotion Board. The Board met on 20 January 1998 and recommended his promotion to the post. By a decision of 3 February 1998, the Director General promoted Mr L. to the post.

On 3 March 1998 the complainant filed an internal complaint against this promotion and the rejection of his own application. The case was referred to the Joint Committee for Disputes, which recommended that the internal complaint should be upheld in view of the insufficient information given on the rejection of the complainant's application and the absence of a reasoned report of the Selection Board. For the latter reason the Director General upheld the internal complaint. Mr L.'s promotion was cancelled on 31 July 1998 with effect from 1 June 1998. By a decision of the same date, under the terms of Article 8 of the Staff Regulations, Mr L. was called upon to occupy the post *ad interim* with effect from 1 June 1998.

The Selection Board met once again on 29 July, re-examined the applications and drew up a report dated 30 July giving its reasons for the classification of the candidates by order of merit. The ad hoc Promotion

Board, meeting on 9 September, recommended the promotion of Mr L. The Director General decided on 15 September, with effect from 1 October 1998, to end the interim appointment of Mr L. and to promote him to the post.

On 14 December 1998 the complainant lodged an internal complaint against the promotion of Mr L. and the rejection of his own candidacy. At the same time he requested his promotion to the post in question, with effect from 1 April 1996, or the provisional award of 250,000 Belgian francs in moral and material damages. The case was referred to the Joint Committee for Disputes, which unanimously recommended the dismissal of the internal complaint, while envisaging the possibility of awarding the complainant financial or other compensation in view of the procedural errors and delays from which he had suffered and which were attributable to the Agency. By a decision of 4 May 1999 the Director General dismissed the internal complaint.

2. The complainant filed this complaint with the Tribunal seeking the quashing of that decision. He also requests that the promotion of Mr L. and the rejection of his own application be set aside, and that he be awarded 1,500,000 Belgian francs in moral and material damages, without prejudice to any subsequent revaluation of the sum. Subsidiarily, he claims 500,000 francs in moral damages, without prejudice to any further increase in the amount. In his rejoinder he raises the amount set in his first financial claim to two million francs.

The Agency calls for the complaint to be dismissed.

The pleas of the parties are examined below.

3. The complainant calls for the production as evidence of the originals of the Selection Board's reports of 21 November 1997, 20 March 1998 and 30 July 1998, as well as the hearing of the members of the Board as witnesses to ascertain whether they met on 30 July 1998 and what they decided. The complainant alleges that the copy of the report of 30 July 1998 contains incoherencies and anomalies, which leads him to believe that the Board reworked the report of 20 March 1998, which is itself a reworked revision of the report of 21 November 1997.

The Agency produces the report of the Selection Board of 21 November 1997 in support of its surrejoinder. It maintains that the report of 30 July 1998 is authentic, even though it contains a number of errors on points which are not decisive. Since it was only the absence of a reasoned report of the Board which was challenged, the Board could use a previous report and attach a statement of its reasons.

The Tribunal does not find it necessary to order further inquiries. The evidence provides no proof that the document submitted is false in either its composition or its content. The copy submitted by the Agency was certified on 3 December 1999 by the responsible Director as corresponding to the original. Moreover, as the Board was invited in the latter stages to produce a reasoned report, in accordance with the fifth paragraph of Article 6 of Rule of Application No. 2 concerning the procedure for assignment to a post, as well as with the case law established in Judgment 1689 (*in re* Montenez No. 2), nothing prevented it from reusing a previous report or reports by adding the reasons which had hitherto been missing, since the procedure had only been cancelled from the stage at which it was flawed, namely from the drawing up of the report which had to include reasons in the form required by the applicable rules. If the Board was able to provide the necessary reasons on the basis of documents it already had, nothing prevented it from making use of them. It is of little importance that the Board reached the same conclusions as in its first examination of the candidates, which had been undertaken in the context of the same competition. Certain discrepancies in the report alleged by the complainant on secondary matters which are not decisive are not such as to cast doubt on the authenticity of the report (see under 5 and 10 below).

4. The complainant has certain pleas which are not directed against the final decision in the competition, but against earlier measures or decisions, namely, the failure to put the post up for competition more rapidly and the various temporary appointments of Mr L.

For the Agency these pleas are not receivable on the grounds that internal complaints on these matters had not been lodged or pursued and that these acts caused no injury to the complainant.

The complainant specifies that he is not challenging these earlier acts as such. He refers to the case law, as set forth in particular in Judgment 1000 (*in re* Clements and others), and relies on the possibility of challenging "the lawfulness of any general or prior decision, even by someone outside the organisation, that affords the basis for" the impugned decision.

In any event, the conditions for the application of this case law are not fulfilled in the present case. The delay in putting a vacant post up for competition and the decisions concerning the temporary appointments to the post, as provisional measures, do not constitute "general or prior decision[s] ... that [afford] the basis for" the decisions to promote one employee and reject the application of another. The redress sought by the complainant would undermine the authority and stability of administrative decisions not challenged in the required form or time-limits (see, for example, Judgments 1934, *in re* Saunders No. 19, and 1935, *in re* Fabiani No. 4).

However, in connection with the claims against the final selection, and particularly the plea of abuse of authority, the Tribunal will examine all the circumstances of the competition procedure.

5. With a view to shedding light on the issues at stake, certain principles applicable to competition procedures will be recalled, as well as their application in the present case.

(a) The competition opened in 1995 was interrupted by the Director General before it had been completed and after the complainant's application had been rejected.

The complainant was right not to challenge the authority of the Director General to do so.

Precedent has it that, in the interests of the organisation, a chief executive may interrupt a competition, even in order to change the requirements of the post (see Judgment 1771, *in re* De Riemaeker No. 4, under 4(e), and the judgments cited therein).

He may even decide not to proceed to any appointment or promotion if he concludes that none of the candidates meets the specified requirements (see Judgment 1771, under 4(c)).

(b) The temporary appointment of an employee to a vacant post may correspond to the interests of the organisation. As such, it cannot be criticised. Moreover, such a measure is envisaged by Article 8 of the Staff Regulations.

If the person appointed *ad interim* is or could also be a candidate for the post open to competition, the temporary appointment may enable the candidate to acquire more easily than his or her rivals the experience or seniority required for definitive appointment to the post. Such an appointment may thereby give the impression that the organisation wishes to favour that candidate. In this respect, there is a certain contradiction between the concern to ensure that the post is immediately operational and respect for the principle of equality between the various rivals. The organisation has at one and the same time to ensure its own proper functioning and to respect its employees without causing them any prejudice. It therefore has to take the necessary measures in so far as possible to minimise any such disadvantages in cases where it decides that a temporary appointment is justified, when it determines the conditions for it and when it takes steps to fill the post (see, for example, Judgment 1771 above, under 4(f), 6 and 7).

The question of whether these conditions were fulfilled here is examined below.

(c) In Judgment 1689, under 8, the Tribunal recalled that the fifth paragraph of Article 6 of Rule No. 2 required the list of suitable candidates established by the Selection Board to be accompanied by a reasoned report, without which there can be no promotion or appointment.

The Director General was therefore right to cancel the first decision to promote Mr L., which was based on a list of suitable candidates not supported by a reasoned report, and to invite the Selection Board to resume the procedure from the point at which it had been flawed.

(d) The Tribunal's case law has it that it is not necessary to take up the whole procedure when it is easy to determine the point at which it began to be flawed. In Judgment 1771, *in re* De Riemaeker No. 4, under 4(b), it found that where a short list drawn up by the Selection Board had to be corrected because one candidate did not meet one of the required conditions, the corrected list should be transmitted to the ad hoc Promotion Board without any further measures.

In the present case the flaw was the absence of a reasoned report of the Selection Board. If the latter had previously recorded its reasons and was able to correct the short list in this regard, it only needed to add this information and transmit the corrected short list to the ad hoc Promotion Board (see under 3 and 10).

6. The complainant argues that the Agency committed abuse of authority by delaying the competition (and by making a temporary appointment to the post). He says that this made it possible to favour the candidacy of Mr L., who would not otherwise have been able to meet the requirement of completing two years' service in the grade within the time-limit for submitting his application. Indeed, Mr L. had obtained the grade A5 on 1 December 1994 and could not therefore apply for the post before 1 December 1996.

Abuse of authority presupposes that a procedure is used for a purpose for which it was not intended. The Agency has provided convincing reasons for its delay in putting the post up for competition, namely so that it could manage the reorganisation of the services concerned more effectively. There is no serious proof that it acted in such a way as to favour one candidate to the vacant post to the detriment of another. The delay in opening the competition perhaps allowed employees to complete the necessary period of seniority, but this was a normal consequence of the measure, not its purpose. The complainant was also able to complete the required period as a result of the first rescheduling of the competition for the post of Head of Bureau GS.4. The possibility that the delay might have this effect was not such as to prevent the Director General from exercising his discretionary authority in the interests of the Organisation in choosing the date on which the post would be put up for competition.

The plea is therefore devoid of merit.

7. The complainant has also criticised the fact that the Director General did not put the post up for competition as soon as it fell vacant.

But he cannot directly challenge a failure to act which he did not contest at the outset or in respect of which he did not pursue an internal complaint that he had already filed. He may only invoke it as an element of an alleged abuse of authority.

The same applies to the temporary appointment. There is no serious proof that in so doing the Director General wished to favour Mr L. in an untoward manner without taking into consideration the interests of the Agency.

The absence of any such intention does not mean, however, that the Agency could keep a post vacant for an unlimited period with the corresponding functions being discharged on a temporary basis by other employees (see under 8 below).

8. Article 8 of the Staff Regulations reads as follows:

> "An official may be called upon to occupy temporarily a post in his category or service which is higher than his substantive post. From the beginning of the fourth month of such temporary posting, he shall receive a differential allowance equal to the difference between the remuneration carried by his substantive grade and step and the remuneration he would receive in respect of the step at which he would be classified in the starting grade if he were appointed to the career bracket of his temporary posting.
>
> Temporary postings shall be restricted to one year except where their purpose is, directly or indirectly, to replace an official seconded to another post in the interests of the service, called up for service in the armed forces or absent on protracted sick leave."

The complainant alleges that the Agency did not apply this provision correctly. His claim may be examined in relation to the considerations set forth under 4 above.

(a) In the first place, the complainant challenges the explanation provided by the Agency that the temporary appointment which started on 1 April 1996 ended on 31 March 1997, in accordance with the above provision. The Agency indicates that when the decision was taken to bring an end to the temporary appointment, it was envisaged that Mr L. would be given a new assignment. Although there was no written decision on this, Mr L. did return to his former functions as expert at grade A5 in the Bureau GS.4, the direction of which was entrusted to the Director of the General Secretariat.

The complainant disproves this statement by producing two documents issued later than 31 March 1997 – they are both dated 9 September 1997 – and signed by Mr L. in his capacity as acting Head of the Bureau. One even contains an organisational chart in which Mr L. is designated as such.

In its surrejoinder the Agency states that, as from 1 April 1997,

> "formally, the Director of the General Secretariat himself assumed the responsibilities of Head of Bureau, even though Mr L., as the highest ranking expert in the Bureau GS.4, was *de facto* most frequently in the situation of 'acting Head'."

In its view this was admissible. It says that Article 8 of the Staff Regulations is intended solely to determine the status of employees called upon to occupy a post temporarily and does not confer any rights on other employees, and particularly on any candidates to the vacant post, with the result that any alleged breach of Article 8 could not prejudice the complainant.

It would therefore appear that in practice the temporary functions were discharged for more than one year.

(b) The complainant infers that the first temporary appointment in fact lasted until 1 February 1998, the date on which Mr L. was promoted to the post in question.

(c) He adds that when the Director General cancelled the decision to promote Mr L. on 31 July 1998 with retroactive effect to 1 June 1998, the consequence was that the functions he had carried out since 1 February 1998 were not covered by the decision to promote him, and that they must therefore also be considered as having been exercised *ad interim* from 1 June, and even logically from 1 February when the appointment came into effect. As a result, the first temporary appointment lasted from 1 April 1996 to 31 July 1998.

(d) In formal terms, the second temporary appointment covered the period from 1 June to 1 October 1998, when the new decision to appoint Mr L. came into effect. The complainant alleges that the temporary appointments followed one another and that there was in fact only one temporary appointment.

The precise scope of Article 8 of the Staff Regulations may be debated under different heads.

As for its purpose, the complainant contends that it is essentially an organisational provision intended to prevent posts from being left vacant, in the interests of the Organisation and of the employees concerned. In the view of the Agency, the provision is exclusively intended to protect employees called upon to occupy a post on a temporary basis. However, as explained below, the case does not turn on this point.

As for the calculation of the one-year time-limit, the requirement to respect it should not be interpreted too restrictively. Where two temporary appointments follow one another, but are decided upon for totally different reasons, they may also be treated as being totally independent and the requirement of a maximum time-limit of one year may be applied to each period separately. Furthermore, where an appointment or promotion is cancelled, the period for which an employee has carried out his duties cannot subsequently be considered as being a temporary appointment under the terms of Article 8 of the Staff Regulations.

It therefore follows that the first and second temporary appointments, which were decided upon for different reasons, each set off a different time-limit. Further, the time-limit envisaged in Article 8 does not apply to the period when Mr L. discharged his functions after being appointed to the post, even if the decision to promote him was subsequently cancelled.

9. The complainant argues that he was not called for an interview before the appointing authority took its decision. He sees this as a violation of Article 7 of Rule No. 2 and of his right to equality of treatment.

The Agency denies any such violation.

Article 7 provides that the selection by the Director General "shall be made in the light of a reasoned opinion, based on assessment interviews, provided by the unit concerned". Paragraph 3, last indent, of office notice 25/94 of 8 December 1994, which amends Rule No. 2, states that:

> "Candidates shortlisted will be assessed by means of interviews, which may include tests, and/or other assessment procedures. A recommendation of the most suitable candidate(s) will be made by the service concerned to the appointing authority."

Article 45(1) of the Staff Regulations also provides that promotion shall follow "consideration of the comparative merits of the officials eligible for promotion and of the reports on them".

These provisions do not indicate precisely when an interview is necessary. They cannot be interpreted as obliging the authorities concerned to interview all candidates. Such an interpretation would not be within the meaning of these provisions. Indeed, in the case of candidates who from the outset are not in contention, such an interview would have little meaning. While an interview is necessary to classify candidates found to be *ex aequo* by the Selection Board, it would not appear to be essential for candidates who are not placed in the first group if the appointing authority decides to follow the order of priority in the Selection Board's short list.

Nor did the Agency's bodies misuse their discretionary authority in the present case in refraining from calling the complainant for an interview.

As he was not in the same situation as the successful candidate, who was classified in the first group and who was interviewed, nor can it be considered that the complainant was the victim of any unequal treatment.

10. The complainant expresses doubts as to the lawful nature of the last competition procedure. In his view it is doubtful that the Selection Board's reasoned report bearing the date 30 July 1998 is authentic, or even that the Board met on that date and adopted the report, which appears to be no more than a reworking of earlier reports.

The Agency has produced a copy of the short list of suitable candidates and the Selection Board's reasoned report, signed by the members of the Board on 30 July 1998, which was certified by the responsible Director on 3 December 1999 as corresponding to the original.

The Tribunal has no reason to doubt the authenticity of this document.

The Selection Board may have, and is even likely to have, reused certain documents drawn up during the first part of the procedure. This gives rise to no criticism if the Board was in possession of the elements enabling it to affirm the accuracy of its list of suitable candidates and its reasoned report. From this point of view, it is of no importance that it based its final decision on its first examination of the applications, rather than the second, nor that the report contains some discrepancies which have no bearing on the case (see under 3 and 5 above).

The claim is therefore without merit.

11. The complainant sees a legal flaw or an evident error of judgment in the fact that the Director General and the bodies on whose opinion he based his decision committed an abuse of their discretionary authority in giving preference to the candidacy of Mr L. rather than his own, and in not taking into account the fact that the alleged superior experience of his rival had been improperly acquired as a result of his temporary appointments. With regard to his own experience, he describes his education and the important posts he occupied with their incumbent responsibilities.

In its report of 30 July 1998 the Selection Board sets out in an annex its selection criteria, verifying for each candidate whether he fulfilled these criteria. In its comments it explains its reasons and how it drew up four groups based on the suitability of the candidates.

In its reply the Agency also explains in detail the reasons for which it gave its preference to Mr L.

The information provided on this point by the Agency has not been contested as such by the complainant and may therefore be held to be established.

(a) The manner in which the Selection Board weighed the merits of the candidates cannot be considered to be flawed. The organisation is the judge of its own needs. It was certainly reasonable to consider that the post to be filled required particular strengths in the fields of organisation and management (see Judgment 1771 cited above, under 6, and the case law referred to therein). It was also entirely justifiable, taking into account the problems and technical advances, to view recent experience as being preferable (and more certain), with the result that preference was given to the candidacy of Mr L.

(b) It therefore follows that, the Agency gave preference to Mr L., not because of the experience he had acquired in discharging his temporary functions, but exclusively or mainly because of his work for Eurocontrol in the General Secretariat.

The temporary appointments did not therefore have a decisive influence on the selection for the post. The evidence provided by the Agency disproves the contrary opinion expressed by the Joint Committee for Disputes, which did not, however, conclude that the competition procedure was flawed. In this regard, it should be noted that the two decisions concerning the temporary appointments were not in themselves unlawful, and that only the *de facto* extension of the first temporary appointment might appear to be debatable.

(c) The complainant cites as precedents certain judgments by the Tribunal and the Court of First Instance of the European Communities, in which a temporary appointment was challenged as such and set aside on the grounds of abuse of authority because the person appointed did not have the necessary qualifications. This is not the point at issue in the present case, and those precedents are therefore not pertinent.

12. The complainant requests that Eurocontrol be ordered to pay him various amounts in compensation for the injury he suffered resulting, firstly, from the unlawfulness of the impugned decision and, secondly and subsidiarily, the manner in which the administrative procedures were carried out. On the first point, his claims to have the decision quashed cannot succeed and his claims to compensation for the unlawful nature of the impugned decision must therefore also fail. On the second point, there is no evidence to show that the manner in which the procedures were carried out resulted in any injury to the complainant which would justify compensation.

13. The complaint, which is devoid of merit under all heads, must therefore fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-NINTH SESSION

***In re* Gomes Pedrosa** **Judgment No. 1983**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Volia Gomes Pedrosa against the United Nations Industrial Development Organization (UNIDO) on 1 July 1998 and corrected on 21 October 1998, UNIDO's reply of 3 February 1999, the complainant's rejoinder of 25 May and the Organization's surrejoinder of 16 September 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Brazilian citizen born in 1964, was recruited on 22 August 1994 as a typist at grade G.2 by the UNIDO Service in France for the Strengthening of Industrial Co-operation between France and Developing Countries (hereinafter UNIDO Service in France). Her initial appointment was for one month and ten days and it was followed by a series of short-term contracts – the last one expiring on 31 December 1997. She was assigned to work with the Brazilian delegates successively appointed to the Service.

The Director of the UNIDO Service in France spoke with her on 6 November 1997 and told her that the Organization did not intend renewing her contract when it expired on 31 December.

On 7 November she left for Brazil on mission. In a fax message of 11 November the Brazilian delegate, the complainant's supervisor, "confirmed" that "by mutual agreement" the complainant's appointment would not be renewed after 31 December and explained that what she needed was a "secretary with shorthand and typing", whereas the complainant wanted an appointment as a technical assistant which did not tally with the needs of the service. In a second fax message of 20 November she explained what she meant by "mutual agreement": she referred to the fact that the complainant had told her of her intention to return to Brazil and had asked for her help in finding a job there. She repeated that her contract would not be renewed. In a reply she faxed to her supervisor on 23 November 1997 the complainant said that the decision not to renew her appointment had arisen from a misunderstanding since she had not yet come to a final decision about returning to Brazil.

On 5 January 1998 the complainant went to see the Director of the UNIDO Service in France. The upshot of the talk was that she was no longer to come to work. By a letter of 13 January she asked him to confirm the non-renewal of her appointment in writing, deeming the Brazilian delegate's decision to be of no legal value. By a letter of 16 January the Director replied that the Brazilian delegate had "full authority ... to choose her staff" and confirmed the non-renewal.

By a letter of 6 February 1998 the complainant requested the Director-General to reconsider this decision or else allow her to go straight to the Tribunal. Having received no reply, she filed this complaint.

B. The complainant objects that she was informed of the decision not to renew her contract by "a mere fax" while she was on mission abroad, which was contrary to the Staff Rules and Regulations and there had been no indication that such a decision was likely. She submits that the Organization had "purely and simply" dismissed her in breach of its duty of good faith and loyalty towards her.

The decision was not taken by the competent authority. As UNIDO was her employer, it should have been taken not by the Brazilian delegate but by the Director-General of the Organization. UNIDO also failed to give her one month's notice.

She denies having expressed any firm intention of returning to Brazil. There was no mutual agreement between herself and the Brazilian delegate and the latter had no good reason not to renew her appointment.

Lastly, she contends that her job title over the period from 1994 to 1997 was inaccurate. Right from the start she was a "special assistant" and indeed she possessed a card that said so. Her pay never matched the duties she performed and she estimates the difference in salary as equal to 433,600 French francs for the entire period of her service at UNIDO.

She asks the Tribunal to quash the implied rejection of the request she made in her letter of 6 February 1998 and to order all consequent redress. She claims 200,000 francs in damages, 433,600 francs in back pay and 40,000 francs in costs.

C. In its reply the Organization objects to the receivability of the complaint. The complainant should have challenged the message faxed to her on 11 November 1997, which contained the decision not to renew her contract. The later communications merely confirmed that decision.

She appealed to the Director-General only on 6 February 1998 and so exceeded the time limit of sixty days prescribed in UNIDO Staff Rule 112.02(a).

Her claim to back pay is irreceivable because she failed to exhaust the internal remedies.

In subsidiary argument it explains that the procedure to be followed by the Administration in communicating its decisions is not indicated in the Staff Rules and Regulations. Citing the case law, it notes that the Tribunal allows the use of communication methods such as telexes.

It did not dismiss the complainant but merely refused to renew her contract, and she was informed of that decision forty-eight days before it expired. It adds that notice of non-renewal is not required by the rules.

The needs of the service changed with the arrival in January 1997 of the new Brazilian delegate. What she wanted was a secretary/shorthand typist to perform secretarial duties. But that job did not suit the complainant, who wished to be recruited as a technical assistant. The fact that she had taken on more activities did not mean she was "released" from her initial duties, nor did it create any new obligations on the part of UNIDO.

It observes that it was not required to obtain her agreement to the decision not to renew her appointment. The Director of the UNIDO Service in France took his decision on 6 November and conveyed it to her orally. The Brazilian delegate's fax message merely notified to her in writing a decision of which she had already been informed verbally.

The amounts she claims correspond to the salary of a different category of staff – which was not the one specified in her contracts. Her claim to back pay is therefore devoid of merit.

D. In her rejoinder the complainant asserts that it was the Director's letter of 16 January 1998 which constituted the written notice of non-renewal as it was the only final administrative decision and is the decision under challenge. Her appeal of 6 February 1998 to the Director-General was therefore filed within the time period specified in Rule 112.02(a).

Citing the case law she submits that an organisation may not end someone's appointment without first warning that person of his or her shortcomings. Furthermore, reasons must always be given and the decision notified within a reasonable period. However, UNIDO gave her no warning and did not officially inform her of the non-renewal until 16 January 1998, after her last contract had expired.

She points out that she never refused to perform the duties of a typist. The decision not to renew her appointment was therefore "purely arbitrary" in that it was prompted by the Brazilian delegate's wish to be rid of her "for personal reasons" that had nothing to do with "the proper running of the service". Since the duties of "special assistant" were not part of her contract, they were of indefinite duration. UNIDO never withdrew those duties.

She alleges that her claim to back pay is simply the consequence of an abuse of authority and must therefore be declared receivable.

E. In its surrejoinder UNIDO presses its arguments and rebuts the pleas put forward by the complainant in her rejoinder.

It submits that she provides no evidence of bias on the part of the Brazilian delegate. Besides, the latter stated that in February 1997 the complainant had herself admitted that she did not want to do typing work.

CONSIDERATIONS

1. The complainant was recruited in August 1994 as a typist by the UNIDO Service in France. After an initial appointment of one month and ten days, she was given a series of short-term contracts, the last of which, signed on 16 July 1997, expired on 31 December 1997. On 13 November 1997 while she was in Brazil on mission for the Organization she received a fax message dated 11 November from her first-level supervisor, the Brazilian delegate to the UNIDO Service in France, "confirming" that "by mutual agreement" her contract, due to expire on 31 December 1997, would not be renewed in 1998 and that her wish to be recruited as a technical assistant did not tally with the needs of the service. A second fax message, dated 20 November 1997, confirmed the first one and its author explained that the reference to a "mutual agreement" stemmed from the fact that a few months earlier the complainant had sought her help in finding work in Brazil where she planned to return to live. On 23 November 1997 the complainant answered the two messages. She expressed surprise at their content and stated that she had never agreed to the non-renewal of her appointment; that she had not reached a decision about returning to Brazil; and that although the duties she performed were not those of a typist but of a technical assistant, she was ready to continue performing them. She confirmed those statements in a fax message dated 28 November 1997.

2. On returning to Paris after taking authorised leave in Brazil, the complainant went to the UNIDO Service in Paris on 5 January 1998, but the Director of the Service reminded her that her appointment had not been renewed and asked her not to return to her former work place. On 13 January 1998 she wrote a letter of protest to the above Director in which she stated that her supervisor's intentions were of no legal value without a

letter of confirmation from the Director, as he alone was her employer. The Director wrote to her on 16 January 1998 confirming the non-renewal of her appointment. He also reminded her that her supervisor, the Brazilian delegate, had full authority over her and that the successive renewals of her appointment had always been notified to her by the serving Brazilian delegate. In a letter of 6 February 1998 to the Director-General of UNIDO, the complainant submitted a request, pursuant to Staff Rule 112.02, for a review of the decision contained in the letter of 16 January. She also asked, in the event of a negative response, to be allowed to come straight to the Tribunal without having to go before the Joint Appeals Board. Having received no reply, she filed this complaint, in which she seeks the quashing of the implied decision, and claims 200,000 French francs in damages, 433,600 francs in back pay for the salary she would have been entitled to had she been paid in accordance with the duties she actually performed for forty months, and 40,000 francs in costs.

3. The Organization raises several objections to receivability. Its arguments concerning her claim to back pay are undoubtedly sound: the claim was submitted directly to the Tribunal without having been made in an internal appeal. Contrary to what the complainant asserts in her rejoinder, it is quite separate from her claim concerning the non-renewal of her appointment; and that she was allegedly underpaid bears no relation to the injury caused by the termination of her appointment. The claim is therefore irreceivable since she failed to exhaust the internal remedies.

4. However, her claim to compensation for the injury caused by the non-renewal of her contract is receivable. The defendant cites Staff Rule 112.02(a), which states:

> "A serving or former staff member who wishes to appeal an administrative decision under the terms of regulation 12.1, shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing."

The Organization contends that the non-renewal decision was given in the letter of 11 November 1997, received by the complainant on 13 November, and that she therefore had until 12 January 1998 to ask the Director-General to review it. Since she submitted it on 6 February 1998 her request was out of time. The plea fails: although the Brazilian delegate's letter of 11 November 1997 told the complainant clearly that her contract would not be renewed, it was a personal letter referring to a "mutual agreement" which obviously did not exist. The letter could not be regarded by the complainant as an administrative decision taken by the competent authority which could set off a time limit for appeal. It is true that the complainant was aware of the Organization's intentions, having been informed of them several times, in particular, in a talk with the Director of the UNIDO Service in France on 6 November 1997 and by the fax messages of 11 and 20 November 1997. Nevertheless, she was right to wait for official notification of an administrative decision from the competent authorities of UNIDO before challenging the measure. Although the letter of 16 January 1998 signed by the Director of the UNIDO Service in France appears to be merely a letter of confirmation, it is the only official administrative decision adversely affecting the complainant. Her letter of 6 February 1998 seeking a review of it was therefore in time.

5. In support of her claim to the quashing of the decision, the complainant submits that UNIDO was in breach of its duty of good faith and loyalty towards her, particularly since it failed to inform her in good time of its intention not to renew her contract; and that the termination of her appointment was based on wrong facts, which amounts to failure to provide reasons.

6. The evidence shows that, being employed under a series of short-term contracts, the complainant knew that her appointment was not automatically renewable. In the absence of convincing written evidence – other than the fax messages of 11 and 20 November 1997 – it cannot be denied that there was tension between the complainant and the Brazilian delegate, prompted in part by the discrepancy between the tasks the complainant actually performed and the Service's need for a real secretary – the job for which the complainant had been recruited – and not a technical assistant. Consequently, the complainant may not allege that the non-renewal of her contract came as a surprise and that she was given no warning – which would have been contrary to the principles that govern relations between an organisation and its staff. As to the absence of one

month's notice, UNIDO rightly points out that the obligation arising from the provisions of the Staff Regulations applies to dismissal and not to non-renewal of a fixed-term appointment. Nonetheless, the case law says that an organisation must always give the reasons for a decision not to renew an appointment and those reasons must be notified to the staff member within a reasonable time.

7. In this case, there is some doubt as to the Organization's real reasons. The first fax message addressed to the complainant referred to a "mutual agreement" which clearly did not exist. The fact that she did not actually perform the duties of a secretary was undoubtedly one of the reasons for the final decision. But that situation was not new. UNIDO seems to have accepted it and apparently issued no warnings on that score. A letter, submitted in the surrejoinder, addressed by the delegate of Brazil to the Director of the Service and dated 2 February 1999, mentions that "she [the complainant] never did her work properly and refused to help Mrs C.", which does imply that there were personal criticisms of the complainant, though the evidence includes no assessment of her work. In short, taken together, the above elements indicate that the explanation given for the non-renewal of the complainant's appointment is far from clear and precise reasons are lacking. As the Tribunal recalled in Judgment 946 (*in re* Fernandez-Caballero):

> "As a rule the reasons for any administrative decision must be stated. Non-renewal is plainly a decision of great consequence to a staff member and, though the Director-General is free to make his own assessment of the material facts, the staff member is entitled to know the reasons for the Director-General's conclusion so that he may, if he chooses, lodge first an internal appeal and then, if need be, a complaint with the Tribunal."

8. The impugned decision of 16 January 1997 merely informs the complainant, without any statement of reasons, that the Brazilian delegate "has full authority ... to choose her staff and, of course, define their duties". The reasons given by the Brazilian delegate – who has only such authority as is mandated by the general management of UNIDO – being neither clear nor established as regards the complainant's agreement to the non-renewal of her appointment, the Tribunal considers that the decision under challenge must be set aside for want of an adequate explanation. The complainant

seeks neither reinstatement nor a new contract, but redress for injury which the Tribunal sets at 50,000 French francs.

9. Since the complaint succeeds in part, she is entitled to costs, which the Tribunal sets at 20,000 francs.

DECISION

For the above reasons,

1. The challenged decision is set aside.
2. UNIDO shall pay the complainant compensation in an amount of 50,000 French francs.
3. UNIDO shall pay the complainant 20,000 francs in costs.
4. Her other claims are dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation
the French text alone
being authoritative*

EIGHTY-NINTH SESSION

***In re* van Walstijn** **Judgment No. 1984**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Bartholomeus Gerardus Gosennus van Walstijn against the European Patent Organisation (EPO) on 15 March 1999 and corrected on 28 June, the EPO's reply of 13 September, the complainant's rejoinder of 23 November 1999, and the Organisation's surrejoinder of 14 February 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch national born in 1965, joined the European Patent Office, the secretariat of the EPO, as an examiner on 1 August 1990. He was assigned to the EPO's Directorate-General 2 in Munich, Germany. At that time he had been living in Copenhagen, Denmark. Under Article 81(1)(a) of the Service Regulations for Permanent Employees of the European Patent Office, he was entitled on taking up his appointment, to reimbursement of expenses incurred for the removal of household and personal effects to his new place of employment. Paragraph 4 of that same article provides that up to two consignments of goods will be reimbursed. The first consignment, exceptionally approved from his home town, Laren (the Netherlands), to Munich via Copenhagen took place in August 1990. At issue is the request for reimbursement of expenses for a second consignment.

On 30 April 1997 the complainant submitted form 4400 requesting approval for reimbursement of expenses for a removal scheduled for 22 May from Laren (the Netherlands) to Munich (Germany). In compliance with Article 81(3) of the Service Regulations, he submitted estimates from two removal companies and the competent department in the EPO approved one of the estimates. A removal was carried out on 22 May. Shortly thereafter the Personnel Department received an invoice from the removal company dated 30 May for a removal on 22 May that had allegedly taken place from Laren to Munich. The Personnel Department then telephoned the complainant, informing him that it had received the invoice from the removal company and asked him to sign the appropriate section of form 4400 so as to enable the Organisation to make a direct payment to the company. On 2 June the complainant signed the form under the statement: "I hereby authorise the office to accept and settle direct the invoice from the firm instructed by me to carry out the removal".

Since there was some doubt as to whether the removal (second consignment) from Laren to Munich had actually taken place given the fact that the complainant had requested special leave for a move within Munich, the Personnel Department felt it appropriate to verify the removal and it requested a copy of the bill of freight relating to the removal from the removal company on 11 June 1997. Although the company had originally confirmed a removal from Laren to Munich as described in the invoice, it retracted this statement on 16 June by orally informing the EPO that the removal carried out was in fact from Munich to Copenhagen. This was later confirmed in writing on 23 June. On 13 June the Head of the Remuneration Department contacted the removal company which had submitted the second estimate; according to that company, the complainant had requested that a removal within Munich be presented as from Laren to Munich.

On 16 June 1997 the complainant telephoned the Personnel Department and asked them not to settle the invoice. On that same date the Personnel Department wrote to the complainant requesting clarification. In a letter of 18 June he explained that: when his prospects to have a larger apartment in

Munich fell through in the middle of May he decided to send his wife's furniture back to Copenhagen; for that removal, he had expressly requested the removal company to send him the invoice; and when he signed form 4400 the second time he thought it still referred to his request to carry out a removal from Laren to Munich sometime in the future. Upon receipt of that letter, the Director of Personnel Management phoned the complainant to request a meeting; the complainant turned down the request in a letter of 2 July saying that he had already clarified all the issues.

On 17 September 1997 the Vice-President in charge of Directorate-General 4 informed the Chairman of the Disciplinary Committee that the President of the Office had decided to initiate disciplinary proceedings against the complainant. The Committee was asked "to investigate whether the complainant had intentionally attempted to gain around DM 10,000 in reimbursement for removal expenses (Munich to Copenhagen instead of Laren to Munich) to which, as he was well aware, he was not entitled". In a disciplinary hearing on 10 October the complainant was given the opportunity to present his case; his counsel confirmed what the complainant had already stated in his letter of 18 June 1997. At the complainant's request, further hearings took place during which two employees of the removal company confirmed that their company had accepted the complainant's request to indicate on the estimate a removal that was different than the one that had actually been carried out.

On 10 December 1997 the Disciplinary Committee submitted its report to the President of the Office. It concluded that the complainant had intentionally attempted to claim reimbursement of removal expenses to which he was not entitled and that he had not made any attempt to correct the consequences of his actions before suspicion arose. As a disciplinary measure it unanimously recommended a substantial downgrading.

In a letter of 23 December 1997 the Principal Director of Personnel informed the complainant that the President of the Office intended to dismiss him pursuant to Article 93(2) f) of the Service Regulations because his conduct amounted to a serious breach of Article 14 on the general obligations of permanent employees. Nevertheless, the dismissal would not include a reduction of the severance grant under Article 11 of the Pension Scheme Regulations. He was also informed that the President's decision had to be taken within one month of the notification of the opinion of the Disciplinary Committee – that is 9 January 1998 at the latest – and that under Article 102(3) of the Service Regulations he had the right to be heard.

The parties agreed that the complainant would be heard on 20 January 1998. During the hearing the possibility of the complainant resigning in lieu of disciplinary measures was discussed. By a fax to the complainant's counsel on 21 January the Director of Personnel Management informed him that the President of the EPO had decided to dismiss the complainant as from 1 February 1998 but that the possibility of resignation with effect from 1 March 1998 was still an option. On 22 January the Director of Personnel Management sent the complainant's counsel a new fax, informing him that the dismissal date would be as of 1 June 1998.

In a letter of 30 January 1998 to the complainant's counsel the Director of Personnel Management inquired whether the complainant intended to resign and set a deadline of 6 February. In a letter dated 10 February the Director of Personnel Management, having received no request from the complainant to resign, informed the complainant's counsel that the President of the Office had signed the certificate of dismissal, and he attached a copy of it. The original certificate was sent directly to the complainant on the same day and he was asked to acknowledge receipt of it. The complainant did not confirm receipt of the letter and certificate and the EPO sent him a reminder on 15 April. On 17 April the complainant acknowledged receipt of the letter of 15 April, but not of the certificate of dismissal.

On 20 April 1998 the complainant filed an internal appeal against the decision to dismiss him. He asked that the decision be quashed and requested an award of damages for the material and moral injury he had suffered. His employment ended with the EPO on 31 May. The Appeals Committee heard the complainant on 28 October and recommended on 16 November to reject the appeal as unfounded. On 18 December 1998 the complainant was informed that the President rejected his appeal. That is the impugned decision.

B. The complainant denies having committed attempted fraud and contests certain facts as represented by the EPO. He explains that there were two removals planned for mid-May 1997. One consisted of removing furniture belonging to his wife from Munich to Copenhagen. The second consisted of removing the complainant's furniture from Laren to Munich, for which he filled out form 4400 and received the approval of the Organisation. However, as a result of problems finding a suitable new apartment in Munich, only the removal from Munich to Copenhagen could be carried out as planned. That removal could not be reimbursed and he had agreed with the company that the invoice would be sent directly to him; only the invoice for the removal from Laren to Munich was to be sent to the EPO. When he did not receive the invoice in a timely manner he inquired as to its whereabouts and learned that it had been sent to the EPO. He paid the invoice immediately and requested that the company cancel the invoice sent to the Organisation. He telephoned the EPO on his own initiative to inform them of the error.

The complainant argues that the decision to dismiss him was flawed by procedural and substantive errors. The decision did not state the grounds on which it was based, as required by Article 106(1) of the Service Regulations. Nor was the original decision communicated to him, either directly or through his counsel – which is a violation of Article 102(3). His counsel received only an informal notice of the original decision. The notice of dismissal was dated 22 January 1998 but the deadline for communicating the decision had been set as 21 January. The President of the Office signed only the certificate of dismissal but not the letter communicating the decision, thereby also violating Article 102(3). In addition, the certificate of dismissal was dated 22 January but was not sent to the complainant until 10 February.

He contends that he had "at no time intent to deceive the office" which would be a precondition for attempted fraud. This has all arisen out of a mistake made by the removal company. Furthermore, the EPO sustained no damages. He argues that in dismissing him from service pursuant to Article 93(2)(f) of the Service Regulations, the principle of proportionality has been breached since there is not a more severe penalty that could be imposed in cases of actual fraud. The Disciplinary Committee unanimously rejected the option of dismissing him. He claims that the principle of equality has also been breached, as the President of the Office has not given specific reasons for his decision, thus preventing either an objective assessment of the President's actions or a comparison with similar disciplinary cases.

The complainant requests the Tribunal: (1) to quash the President's final decision of 18 December 1998 to dismiss him; (2) to reinstate him and award arrears of pay as from 1 June 1998, when he was dismissed from duty; (3) to award him 25,000 German marks in damages, even if he is reinstated; and (4) to award him 40,000 marks in costs.

C. In its reply the Organisation asserts that since the complainant did not request his reinstatement and payment of his salary as from 1 June 1998 in his internal appeal, those claims are irreceivable for failure to exhaust the internal means of redress. Furthermore, the EPO's decision to dismiss the complainant was not flawed by either procedural or substantive error. It is clear that according to the Tribunal's case law, disciplinary measures are within the discretionary power of the executive head of an organisation and can only be reviewed under limited circumstances, such as those involving abuse of discretion.

It refutes the complainant's argument that it did not comply with Article 102(3) of the Service Regulations. The fax sent by the Director of Personnel Management on 21 January 1998 to the complainant's counsel "was an official communication of the President's decision and not a mere 'informal information'". It is true that the certificate of dismissal was not sent until 10 February, but that is because the complainant had, until 6 February, the option to resign. The information he was given regarding the reasons for his dismissal was sufficient to satisfy Article 106(1).

The EPO denies that there has been a breach of equal treatment. Circumstances arising out of disciplinary cases make valid comparisons difficult. It also rebuts the complainant's argument that the Organisation did not suffer any damages. It does not characterise the issue as one of financial loss, or even potential financial loss, but rather one of loss of trust.

Although the complainant continues to deny that he has committed any wrongdoing, there has been ample proof provided by the removal company that the complainant had asked to have the invoice for the removal of furniture from Munich to Copenhagen to be specified as a removal from Laren to Munich. The element of fraudulent intent was unanimously established by both the Disciplinary and the Appeals Committees. Therefore, the imposition of a disciplinary measure was warranted.

It requests that the complainant be ordered to bear costs.

D. In his rejoinder the complainant presses his argument that his dismissal was legally erroneous on material and formal grounds. He contends that the EPO "wanted to 'establish an example' to the outside" and that it had difficulty understanding the objective facts. He asserts that it was clear to him from the outset which removal could be reimbursed and which one could not and that he had planned on receiving the invoices personally so that he would also control which one would be submitted for reimbursement. Consequently, it is wrong to hold him responsible for the errors of the removal company and its employees. When he signed form 4400 he was not aware of its scope and at that time was being treated for "overwork syndrome"; he has attached a medical certificate as proof. Additionally, he paid the invoice before there was any injury to the EPO and this should have been a mitigating factor on any disciplinary proceedings.

He counters the Organisation's argument that the complaint is partially irreceivable. His internal appeal attacked the President's decision to dismiss him; therefore, quashing the President's decision would place him back in the employ of the EPO. In his appeal he had also asked for material damages, which would include loss of earnings.

E. In its surrejoinder the Organisation contends that the complainant continues to use lengthy explanations to obscure essential facts, such as his having submitted two falsified estimates with form 4400. It notes that the issue of "overwork syndrome" was never mentioned during the disciplinary procedure or the internal appeals process and that the certificate regarding the complainant's health in June 1997 is dated 11 November 1999, just days before the rejoinder was drafted. He has also failed to discredit the testimony of the removal company's employee. It points out that dismissal without a reduction in severance grant is not the most severe form of discipline.

CONSIDERATIONS

1. The complainant was recruited as a patent examiner at the European Patent Office, the EPO's secretariat, on 1 August 1990. The Organisation brought disciplinary proceedings against him for attempting to have the Organisation bear the costs of a removal for which he was not entitled to claim reimbursement (the salient facts are given under A above). As a consequence the President of the Office decided to dismiss him. The decision was notified to the complainant's counsel by two faxes of 21 and 22 January 1998 from the Director of Personnel Management. The date of his dismissal, originally set at 1 February 1998, was postponed to 1 June 1998. The complainant appealed against the decision, but a majority of the Appeals Committee recommended rejection. The President endorsed the recommendation by a decision of 18 December 1998, which the complainant is now impugning before the Tribunal.

Besides the quashing of the decision, he seeks reinstatement, payment of the salary due to him since his dismissal, an award of 25,000 German marks in damages and 40,000 marks in costs.

2. The complainant objects that the decision to dismiss him was not substantiated and shows formal flaws: it was taken more than one month after the Disciplinary Committee reported and was not notified to him in a timely manner by the President of the Office. On the merits he contends that, contrary to what the EPO asserts, he has not committed fraud. Even if he had attempted to do so, he desisted, so the Organisation sustained no injury. He alleges breach of the principles of proportionality and equality.

3. The EPO must of course comply with the principle that decisions adversely affecting employees of international organisations, particularly disciplinary measures, must be substantiated and allow the persons concerned to challenge them effectively. Indeed that principle is enshrined in Article 106 of the Service Regulations. In the complainant's submission, the EPO should have been particularly conscientious in accounting for the decision of 22 January 1998 as the President decided not to endorse the unanimous recommendation of the Disciplinary Committee, which, although it found that the complainant had attempted to obtain reimbursement for

removal costs to which he was not entitled, concluded that, in the circumstances, a downgrading would be a fitting sanction. However, the evidence shows that throughout the procedure the complainant had numerous opportunities to learn of the charges against him and answer them. The President's decision, which expressly cites the opinion of the Disciplinary Committee and the complainant's comments of 20 January 1998, is clarified by the fax of 21 January 1998 sent by the Director of Personnel Management which mentions a hearing that took place in his office, the material rules and the possibility of the complainant's resigning. Having received a letter of 23 December 1997 informing him of the President's intention in the light of the Disciplinary Committee's opinion of 10 December 1997, the complainant was obviously bound to be aware of the reasons why the EPO concluded that he was guilty of serious misconduct warranting a severe sanction. His plea that the EPO failed to explain its decision therefore fails.

4. So too does his plea that the appointing authority was late in notifying its final decision. Article 102(3) of the Service Regulations says that the appointing authority must take its decision within one month of the notification of the opinion of the Disciplinary Committee. It is true that the letter of 23 December 1997 set 9 January 1998 as the deadline for a decision to be taken, possibly after a hearing. But at the complainant's request the time limit was extended by fifteen days, and it had not expired when his counsel was informed, on 21 and 22 January 1998, of the President's decision. The complainant cannot have sustained injury from the fact that the original of the decision was notified to him only later, and even less from the fact that the Organisation allowed him the opportunity to resign, which would have closed the disciplinary proceedings. The notification in the form of a fax was not in itself unlawful and it did not have to be signed by the President personally.

5. The complainant's pleas on the merits are more substantial, but they fail to demonstrate that the impugned decision was unlawful. It is clear from the very abundant evidence, and particularly the well-substantiated opinions of both the Disciplinary Committee and the Appeals Committee, that the complainant did try to get the Organisation to bear the cost of

the removal of some furniture from Munich to Copenhagen – the reimbursement to which he was not entitled – by signing documents stating that the removal was from Laren to Munich – for which he could claim reimbursement, but which did not take place. The fact that uncertainty about where he would live in Munich prevented him right up to the last minute from taking a decision about transferring some of his furniture to Copenhagen does not mitigate the fact that he signed erroneous documents to obtain a reimbursement to which he was not entitled. His misconduct has been established. He paid the offending removal bill by a cheque dated 12 June 1997, received on 16 June, after the Personnel Department had asked the removal company on 11 June to provide a document confirming that the removal was from Laren to Munich, and on 16 June he told the Personnel Department by telephone not to pay the bill. But, although under German criminal law these facts might remove or mitigate the penal nature that could attach to the offence of attempted fraud, when disciplinary sanctions are applied it is immaterial whether or not an act is criminal. Furthermore, the fact that the Organisation in the end suffered no financial injury because it did not have to pay out money it did not owe, does not mean that the complainant's misconduct should not have been sanctioned.

6. Since, quite clearly, his misconduct is established and warrants disciplinary action, the only issue remaining is the delicate one of the President's assessment of how severe the sanction should be. It should be noted in this connection that, although it came down heavily on the complainant in its statement of reasons the Disciplinary Committee decided unanimously on a fairly benign punishment, deeming that his good record for conduct and performance should be taken into consideration, and that his unwillingness to retract his interpretation of the incident as a series of misunderstandings and unfortunate mistakes was probably due to the fact that he had manoeuvred himself into a situation from which there was no way out without loss of face. Neither the President nor the Appeals Committee were convinced by these arguments concerning the complainant's good record and the reasons for his conduct. The majority of the members of the Appeals Committee held that his behaviour constituted a very serious breach of the obligations incumbent on EPO employees and was likely to undermine the mutual trust which must prevail in relations

between the Organisation and its staff, and that the sanction applied was not disproportionate to the complainant's misconduct.

7. The Tribunal recalls that, according to a long line of precedent, shared by other international administrative tribunals, the decision-making authority has discretion in determining the severity of a sanction to be applied to a staff member whose misconduct has been established. But that discretion must be exercised in observance of the rule of law, particularly the principle of proportionality. If a sanction is obviously disproportionate to the charges, the Tribunal will set it aside (see for example Judgment 1447 *in re* Berg, delivered on 6 July 1995). In the present case, the complainant's dismissal is not obviously disproportionate to the attempted fraud with which he is charged and which is a serious breach of the duty of honesty incumbent on international civil servants. Consequently, the complainant's plea of disproportionality between the charges and the sanction fails. The President of the Office did not overstep the limits of his discretionary authority by taking the impugned decision. Contrary to the complainant's assertion, he was not bound to hear him personally. He broke no general principle of law, and particularly not the principle of equality. Lastly, the complainant's state of health, cited for the first time in the rejoinder and described in a medical certificate dated 11 November 1999, has no bearing on the merits of the impugned decision.

8. The conclusion is that the complaint must be dismissed, there being no need to go into the receivability of the complainant's claim to reinstatement.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Vézina** **Judgment No. 1985**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Danielle Vézina against the European Patent Organisation (EPO) on 12 June 1999 and corrected on 28 July, the EPO's reply of 9 December 1999, the complainant's rejoinder of 15 February 2000 and the Organisation's surrejoinder of 23 March 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having considered the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant holds both Canadian and French nationalities and was born in 1946. She joined the European Patent Office, the EPO's secretariat, on 25 January 1993 at the Vienna sub-office. The EPO having refused to extend her contract beyond 31 May 1995, she lodged an internal appeal on 27 June 1995. Her case was referred to the Appeals Committee but while the appeal was still pending the President of the Office allowed her claim and offered her on 23 June 1997 a five-year contract with retroactive effect from 1 June 1995. The complainant accepted the offer on 29 September 1997 but said that she would withdraw her appeal only when "all the administrative formalities and adjustments arising from [her] reinstatement" had been settled. She resumed her duties on 6 October 1997.

By letters of 30 October and 10 December she sought clarification about her entitlement to annual leave and home leave for the period from June 1995 to September 1997. The Administration replied on 19 December 1997 that she had no such entitlement. On 11 March 1998 she lodged a further internal appeal against that decision. In its report of 11 January 1999, which was forwarded to the President of the Office on 22 January and a copy of which was sent to the complainant, the Appeals Committee ruled that the first appeal had become devoid of substance and recommended rejecting the second one as devoid of merit. By a letter of 28 January the Director of Personnel Development informed the complainant that the President of the Office had rejected her appeal. The complainant acknowledged receipt of the letter on 7 April 1999. In this complaint she is challenging the rejection of her claims.

B. The complainant submits that the Service Regulations for Permanent Employees provide clearly that staff members may accumulate annual leave even when they are not working, provided that they are on paid leave. She alleges that the Appeals Committee made mistakes of fact and misconstrued the decision to reinstate her retroactively. She explains that, since the EPO paid her an expatriation allowance, it may not deny her home leave on the grounds that she was living in her home country during the period in question. In her submission, she is entitled at least to home leave from the date on which she resumed work, namely 6 October 1997.

She asks the Tribunal to quash "the non-explicit decision of the President ... following the opinion of the Appeals Committee", and to order the Organisation to grant her the leave she claims, or its monetary equivalent. She claims costs.

C. The EPO replies that the complaint is irreceivable because the complainant did not impugn the express decision in the letter of the Director of Personnel Development dated 28 January 1999. She stated in the complaint form that she was challenging the implied rejection of her two appeals but in the complaint itself, that she is impugning the "decision" constituted, she says, by the Appeals Committee's report of

11 January 1999. Furthermore, her claims to monetary compensation in lieu of annual and home leave and to costs are irreceivable because she did not make them in her second internal appeal.

In subsidiary pleas the EPO observes that the employment contract governs entitlement to annual leave and home leave for the future and even if it is applied retroactively, gives rise to no leave entitlement for the past. It cites circular No. 22 setting out guidelines for leave, which provides that annual leave entitlement accrues, inter alia, on the basis of service completed. The circular contains an exhaustive list of authorised absences which do not reduce the length of annual leave. The list does not mention the case of a staff member who takes up his or her duties retroactively and is paid though having not actually worked. Nor does the case law on reinstatement provide for the retroactive grant of leave. It observes that during the period in question the complainant was not on leave within the meaning of the rules. Furthermore, the prerequisite for granting home leave – namely expatriation – was not met because from mid-November 1995 to the beginning of October 1997 the complainant lived in Canada where she was *de facto* on home leave. The EPO showed generosity towards her by paying her the expatriation allowance. It points out that the complainant was entitled to home leave as from 6 October 1997 and recalls that, for the period prior to that date, it paid her remuneration without deducting any other income she may have earned.

D. In her rejoinder the complainant accuses the Organisation of bad faith: she received the final decision of 28 January 1999 – in the form of a photocopy of the original, the date of which she questions – only on 7 April, i.e. sixty days after the Appeals Committee had forwarded its report to the President of the Office.

On the merits she notes that circular No. 22 "draws up a list of authorised absences (including home leave) and [expressly] excludes" only unpaid leave. She submits that, for the expatriation allowance, the EPO clearly interpreted the start of the contract – 1 June 1995 – as being the date on which she took up her duties. It should have done likewise for the leave she is claiming. She points out that there is a contradiction in the EPO's position: it states on the one hand that she was not on leave within the meaning of the rules and on the other, that she was *de facto* on home leave.

E. In its surrejoinder the Organisation notes that the complainant received the final decision on 7 April 1999 at the latest and that it was therefore the only lawfully challengeable decision when she filed her complaint on 12 June. Circular No. 22 says that the length of leave depends on the length of service completed; but the complainant completed no service during the period in question. It adds that although she was not on leave within the meaning of the rules she was on leave "*de facto*", however, that does not affect her leave entitlement. Lastly, the complainant may not rely on the fact that it paid her the expatriation allowance, since it was not bound to do so.

CONSIDERATIONS

1. The complainant worked for the EPO from January 1993 to January 1995 as an auxiliary staff member at the Vienna sub-office of the European Patent Office. She was given a four-month extension as a contractual employee.

The EPO having refused to extend her appointment beyond 31 May 1995, she lodged an internal appeal on 27 June 1995. Her case was referred to the Appeals Committee, but while it was still pending the President of the Office revoked his decision and on 23 June 1997 offered her a five-year appointment with retroactive effect from 1 June 1995.

On 29 September 1997 the complainant accepted the offer and said that she would take up her duties on 6 October 1997. She indicated, however, that her acceptance should not be construed as an immediate and automatic withdrawal of her appeal.

2. In October 1997 the EPO paid her the remuneration of an expatriate staff member – without deducting any income she may have earned in the meantime – for the period from June 1995 to September 1997.

By letters of 30 October and 10 December 1997 respectively, she asked for retroactive annual leave and home leave. The EPO having refused her request, she filed a second internal appeal on 11 March 1998 which was referred to the Appeals Committee.

3. In its report of 11 January 1999 the Committee unanimously recommended rejecting her second appeal as devoid of merit and found that there was no longer any reason for her first appeal, against the refusal to extend her appointment, since she had been given a five-year contract.

4. By a letter of 28 January 1999, of which she acknowledged receipt on 7 April 1999, the complainant was informed that the President of the Office had rejected her second appeal.

On 12 June 1999 she filed this complaint, in which she asks the Tribunal to quash "the non-explicit decision of the President ... following the opinion of the Appeals Committee" of 11 January 1999, to allow her claim to leave or else award her monetary compensation. She also seeks an award of costs.

5. The evidence shows that the case turns on whether, according to the EPO's rules, the case law and general principles of law, the complainant could be granted annual leave and home leave with retroactive effect for the period from June 1995 to September 1997.

6. Article 59 of the Service Regulations says in part:

"(1) Permanent employees shall be entitled to annual leave of thirty working days per calendar year ... Annual leave should normally be taken before the end of the current calendar year. If this is not possible because of the requirements of the service, it must be taken in the next following year.

(2) The President of the Office, after consulting the relevant joint committee, shall lay down:

a) the rules for granting annual leave;

b) the list of public holidays applicable to each place of employment."

Article 60 of the Service Regulations says:

"(1) Permanent employees who are nationals of a country other than the country in which they are employed shall receive eight working days' additional leave every two years to return home. Travel expenses for such leave shall be reimbursed to the employee concerned under the conditions laid down in Article 77.

> (2) For the purposes of these Regulations, the home of such permanent employee shall be the place with which he has the closest connection outside the country in which he is permanently employed ..."

Circular No. 22, which is about leave, states in pertinent part under Rule 2:

> "Leave entitlement will accrue on the basis of the total length of service completed, including any period of sick leave or annual leave or home leave, as well as any period of notice, even though not actually worked. Periods of unpaid leave will not count towards entitlement to annual leave or home leave."

7. The construction to be put on the above texts is that for the period from June 1995 to September 1997 the complainant is entitled to neither annual leave nor home leave.

8. This construction emphasises that annual leave is a period of rest granted to employees each calendar year, the length of which is calculated on the basis of service completed, and that the right to such leave may be acquired only after a period of actual work which may include periods, of which there is an exhaustive list, that are treated as periods of actual work.

The complainant completed no period of service which may be treated as a period of actual work, and so may not claim annual leave for the period in question.

9. The purpose of home leave is to allow employees whose work separates them for a specified period from the place with which they have the closest connection outside the country in which they are employed, to return there in order to maintain their ties.

The complainant was not required to work during the period from June 1995 to September 1997; and she does not deny residing in Canada, her home country, during that period. Therefore, she may not claim home leave for the period in question. The fact that the EPO granted her the expatriation allowance retroactively does not imply that she was also entitled to home leave.

10. The complaint is without merit and must be dismissed, there being no need to entertain the defendant's objection to receivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

***In re* Flösser (No. 5), Hassler, Herzog, Honig, Müller, Schechinger (No. 3), Stegmüller, Walter (No. 2), Weingand, Wernz and Winkler**

Judgment No. 1986

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mr Hans Flösser – his fifth – Mr Norbert Hassler, Mr Hans Herzog, Mr Erich Honig, Mr Konrad Muller, Mr Erich Schechinger – his third – Mr Albert Stegmuller, Mrs Anne Walter – her second – Mr Manfred Weingand, Mr Otto Wernz and Mr Wolfgang Winkler against the European Molecular Biology Laboratory (EMBL) on 2 August 1999 and corrected on 5 October, the EMBL's reply of 18 October, the complainants' rejoinder of 30 November and additional submissions of 9 December, the Laboratory's surrejoinder of 20 December and its letter of 30 December 1999 to the Registrar of the Tribunal;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are all present or retired staff members of the EMBL and took up employment with the organisation at various dates between

1973 and 1984. Prior to that they were contributing to the German national pension scheme, the *Bundesversicherungsanstalt für Angestellte* (BfA).

At the material time Article 12 of the EMBL Pension Scheme Rules read in part: "A staff member who enters the service of the Organization after leaving the service of a government administration ... may arrange for payment to the Organization in accordance with the Instructions for the implementation of these Rules, of any amounts corresponding to the retirement pension rights accrued under the pension scheme to which he was previously affiliated in so far as that scheme allows such a transfer". Article 43 of the same Rules provides that: "Instructions for the implementation of these Rules shall be drawn up by the Director-General". The Pension Scheme Rules appear as Annex R.E.1 to the Staff Regulations.

Until 1995 the German national scheme referred to above had no provision for the outward transfer of pension rights. One of the complainants wrote to the Director-General on 4 November 1997 and attached data showing the amount that each complainant could potentially transfer into the organisation's pension scheme. The Director-General replied to that letter on 18 November 1997, saying that the question of transfers was under consideration by EMBL's Council. He indicated that he would take no action without its approval and that no decision was expected before the summer meeting of 1998 at the earliest. In a subsequent letter dated 10 December 1997 the Director-General said that staff should make no assumption on the matter of the transfers as it was not known when the Council would reach a decision, or whether it would be retrospective or what methodology would be used.

In March 1999 the complainants wrote individually to the Director-General requesting the transfer of their previously acquired pension rights into the EMBL scheme. In a letter of 19 March the Administrative Director told them on the Director-General's behalf that the position had remained essentially unchanged since 1997 and that the Council had set up a working group to study the question of transfers. On 12 April 1999 the complainants lodged a common appeal with the Director-General, pressing the matter of the transfer. They indicated that they were aware of the existence of the working group and had been informed that it intended proposing the abolition of Article 12. On 15 April he rejected their appeal as irreceivable and indicated that he would be able to take a final decision only after "informed consultation with Council". An exchange of correspondence ensued since the complainants asked the Director-General to convene the Joint Advisory Appeals Board. In a letter of 4 May 1999, which the complainants now impugn, the Director-General said he was unable to accede to that request and confirmed what he had told them in earlier correspondence.

B. The complainants submit that the letter of 4 May 1999 constitutes "a decision not to make a substantive decision" and that they are therefore free to challenge it under Article VII(2) of the Tribunal's Statute. They argue that if that letter cannot be considered a decision under Article VII(2), their complaint is receivable under Article VII(3) because of the Administration's failure to take a final decision.

They contend that Article 12 of the Pension Scheme Rules confers on them the right to arrange to have their pension rights that have accrued under the German national pension scheme – the BfA – transferred to the EMBL scheme. Such is clear from the wording: "A staff member ... may arrange for payment ...". They view that right as part of their employment contract and conclude that they are entitled to ask the Laboratory to make arrangements for the transfer. They hold that their right exists even in the present absence of instructions about the implementation of Article 12, and that the Director-General has a statutory obligation to provide those instructions but has not done so. Instead, the Laboratory delayed taking action on the pretext that the Council had yet to take a decision. However, Article 43 of the Pension Scheme Rules places the obligation on the Director-General and not on the Council.

The complainants want the EMBL to make an arrangement with each complainant for the transfer of amounts accrued under his or her national scheme and for the calculation of the years of "reckonable service" to be credited to the EMBL scheme by reference to the grade each held on confirmed appointment. They want the Laboratory to come to an agreement with the BfA that is "appropriate and adequate" for the transfer of each complainant's rights and they also ask for costs up to an amount of 30,000 German marks.

C. In its reply the EMBL says that for the complaint to be receivable under Article VII(2) of the Tribunal's Statute the complainants should have filed it within ninety days of receiving the letter the Director-General wrote to them on 18 November 1997 because that letter contained "the decision not to make a substantive decision". They did not appeal against it and are now time-barred. Moreover, they cannot plead the implied rejection of their claims under Article VII (3) as the Director-General has said that their appeal will be dealt with – but only in "clearly defined circumstances".

The Laboratory points out that although both Articles 12 and 43 have been in the EMBL's Pension Scheme Rules since 1978 there have been no formal requests for transfers and the 'Instructions' have never been drawn up. It also points out that the complainants knew when they filed their complaint that the Council had reviewed the matter of the transfers. They knew that in July 1999 it had reached a decision on what action to take and would be making a formal decision at its meeting in November 1999.

It holds that the complainants did not meet the requirements of Article 12 and their claims are devoid of merit. Rights conferred on a staff member by that article have to be exercised at the moment of joining the organisation. It is then that the staff member must be in a position to transfer entitlements from his or her previous scheme. But when the complainants took up service with the Laboratory their previous scheme did not allow such a transfer and so they could not request one. It was changes in German legislation in 1995 that opened up the possibility of transferring pension entitlements, but those changes could not lay retroactive obligations on the organisation.

D. In their rejoinder the complainants press their arguments on the receivability of their case. They state that the letter of 18 November 1997 merely summarised negotiation points and was only addressed to one of the complainants. They made no claim until March 1999. From the terms of the letter of 18 November 1997 the complainants were expecting a reply in 1998. They blame the administration for its 'inactivity' and delay. Contrary to what the organisation affirms, at the time they filed their complaint they were unaware of the Council's decision of July 1999.

On the merits they argue that Article 12 allows the transfer of the accrued pension rights after the employee enters the service of the EMBL, but does not specify at what point in time the transfer must take place and mentions no time limits.

The complainants contend that there was unequal treatment. In not arranging the requested transfer the Laboratory is discriminating against them, particularly as staff of other nationalities whose previous pension schemes allowed the transfer were able to proceed.

In additional submissions the complainants produce a letter dated 26 November 1999 from the Administrative Director informing them of the Council's decision to abolish Article 12. They view EMBL's action as a further measure to "deprive" them of their rights but state that the rescinding of Article 12 will have no effect on them as it nonetheless formed part of their contractual relationship with the Laboratory.

E. The Laboratory presses its arguments against the receivability of the complaint. It reiterates its opinion that the letter of 4 November 1997 constituted a 'formal request' for the transfer. The letter of 18 November 1997 from the Director-General did go to all the complainants. Such is clear from the wording of the complainants' subsequent reply of 26 November, a letter which they all signed. It has been clear since November 1997 that the complainants have been requesting the transfer of their entitlements and the position adopted by the Director-General has remained unaltered since that time.

It also refutes the complainants' charges of delay and inaction. The Council did not at any stage make a firm commitment to reaching a decision on the question of the transfers in 1998. The Laboratory points out that two of the complainants were Staff Association representatives on the Finance Committee Working Group that made recommendations to Council on matters concerning the Pension Scheme Rules. They were therefore quite aware that a recommendation on Article 12 was to be put to the Council at its meeting in July 1999 and knew in advance of the proposal to abolish it. The Council too was aware of the complainants' situation.

On the merits, the Laboratory explains that in order to benefit under Article 12 a staff member entering the service of the organisation had to have transferable funds under a previous scheme. It is upon confirmation of appointment that the staff member can take the decision to transfer such funds. What Article 12 makes clear is that the funds must be transferable at that time and the decision cannot be deferred. Even in the absence of implementing instructions the essential requirements for transfer have to be met. The Laboratory reiterates that the complainants had no transferable funds when they joined the organisation and did not meet the requirements of Article 12. Citing the Tribunal's case law, it says that the complainants cannot retrospectively claim a benefit that has come about through a change in German legislation.

In a letter of 30 December 1999 it points out that it received the complainants' additional submission after the filing of its surrejoinder. It states that the Council did not abolish Article 12 to deprive the complainants of their rights. Indeed, the Standing Advisory Committee made its recommendations to Council with regard to the rescinding of Article 12 before the EMBL received copies of the present complaint.

CONSIDERATIONS

1. The complainants are all employees or former employees of the EMBL. Each of them joined the staff at various times between 1973 and 1984. Immediately before doing so, each of them had been a member of the German national pension scheme – the BfA. At the time they joined the staff, they were not given the opportunity of transferring their acquired rights in the BfA to the EMBL pension scheme because the BfA had no provision for such outward transfers. The situation changed in 1995 when the rules governing the BfA were altered so as to permit the transfer of pension rights.

2. In November 1997, in response to a request from the complainants, the Director-General advised the complainants that their request to transfer funds from the BfA to the EMBL scheme could not be accepted since the whole question of transfers in and out of the EMBL scheme was under study and would not be decided by the Council of the organisation before the summer of 1998 at the earliest.

3. Over the ensuing fifteen months, the complainants wrote on a number of occasions to the Administration reiterating their request but the replies received were all to the same effect.

4. Finally, when no substantive decision was forthcoming, the complainants wrote again to the Director-General in March of 1999 requesting that he accept the payment into the EMBL pension scheme of the amounts standing to their respective credits with the BfA. On 19 March 1999 a reply given on behalf of the Director-General indicated that the position remained unaltered from the earlier responses. Treating the letter of 19 March as a decision, the complainants filed an internal appeal against it. On 15 April, the Director-General rejected the complainants' internal appeal as irreceivable but indicated the circumstances under which the appeal could eventually be brought. On 4 May 1999 the Director-General, reiterating his previous position regarding the transfers, refused to convene a meeting of the Joint Advisory Appeals Board to deal with the complainants' internal appeal.

5. By their complaint filed on 2 August 1999, the complainants ask that the defendant be ordered:

> "1. To make an arrangement with the respective Complainant for payment to the EMBL of any amounts corresponding to the retirement pension rights accrued under the pension scheme of BfA on the basis of the grade of the Complainant on confirmation of his/her appointment and the number of years of reckonable service with which the Complainant will be credited under the EMBL pension scheme and to conclude an agreement with BfA with respect to the accrued pension rights of the respective Complainant which is appropriate and adequate to transfer the accrued pension rights of the respective Complainant to the EMBL.

> 2. To bear the legal costs and expenses of these proceedings and the preparation thereof, including the fees of the attorney representing the Complainants, up to an amount of DM 30,000,-."

6. At the material time, the relevant provision was Article 12 of the Pension Scheme Rules which read as follows:

> "1. A staff member who enters the service of the Organization after leaving the service of a government administration or national organization, or any international organization, or a firm, may arrange for payment to the Organization in accordance with the Instructions for the implementation of these Rules, of any amounts corresponding to the retirement pension rights accrued under the pension scheme to which he was previously affiliated in so far as that scheme allows such a transfer.
>
> In such a case the Organization shall determine, by reference to his grade on confirmation of appointment and to the Instructions for the implementation of these Rules, the number of years of reckonable service with which he shall be credited under its own pension scheme."

7. The defendant objects to the receivability of the complaint. The objection is clearly well taken. As was said above, the present complaint was filed on 2 August 1999. The only administrative decision taken with regard to the complainants' request that the organisation arrange for the transfer of their BfA contributions into the EMBL staff pension fund is contained in the Director-General's letter of 18 November 1997. While that was clearly not a substantive decision, it was nonetheless a decision not to accede to the complainants' requests and to defer the matter until it had been considered by the Council of the organisation. Despite the complainants' further requests, the Administration has never altered its position and its replies have all been in the same vein. A decision not to decide upon a request by an employee for the exercise of his alleged rights is nonetheless a decision. It may accordingly be impugned before the Tribunal but only within the time limits prescribed by Article VII of the Tribunal's Statute; those limits started to run on 18 November 1997. They were not suspended or revived by the complainants' repeated requests to the Administration or

by the latter's repeated refusals to make any substantive decision until the matter had been decided by the Council of the organisation. If the complainants were dissatisfied with the Director-General's decision not to decide, they should have filed their complaints with the Tribunal within ninety days of receiving such decision. Since they did not do so, they must now wait until they receive a substantive decision on the merits of their claim. In its reply the EMBL concedes that when a final decision is reached the complainants will have available to them the full right to appeal. The Tribunal is informed in the surrejoinder that the Council has now made a decision relative to Article 12. The present complaint is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-NINTH SESSION

In re Dunseth and Mattmann

Judgment No. 1987

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr Clifford Dunseth and Mr Olivier Mattmann against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 11 June 1999 and corrected on 17 September, the OPCW's replies of 25 October, the complainants' rejoinders of 16 December 1999 and the Organisation's surrejoinders of 25 January 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Considering the applications to intervene filed by:

D. R. Adams
W. Admiraal
I. Akiyama
G. J. Alexander
M. M. F. L. de Almeida
A. Asghar
M. Barbeschi
S. Batsanov
K. Benalla
M. Berdennikov
L. Bijlaard
D. Boudreault
A.-M. Bourke
S. A. P. Braccini
M. Stuart Brass
E. Bravo
O. L. Bustamante
P. Castulik
Z. Chen
D. C. Clagett
G. Coman-Enescu
M. Creyghton

T. C. Crocker
A. Daftari
B. Davey
M. Dekker
G. Fleming
J. J. Fons
S. Foulds
H. Garcia
N. Gay
J. Gee
D. Griffin
J. Habibi
J. Hendrikse
L. Hope
Y. Huang
J. Jacobs
S. R. Jowett
P. J. Kara
F. Karoui
D. Kelly-Lukanski
S. Kisselev
P. G. Lavin
L. R. Lemick
M. Louati
J. Makhubalo
M. Mallikarjunan
J.-C. Maltais
R. G. Manley
S. Martens
A. Graham McKenna
S. Mechken
K. Minarikova
S. Mohanna
L. Moran
A. Mwaura
E. O. Napoliello
S. Neault
R. R. Nelson
L. M. Nicolaï
F. Patel King
T. J. Ponsenard
J.-P. Proulx
R. Raphail
O. Ratchek-Verguina
J. Rautenbach
A. Reid
R. J. Rigg
M. R. H. H. Rijks
J.-L. Rolland
J. Ross
T. Ruijgrok
S. T. Shafer
M. W. Smith
R. Stockton
J. E. Sundby
C. Valenzuela
G. R. Van Raalte
M. T. Villarmia
K. Walker
E. M. H. Willemsen
I. Wilson
J. Wiltenburg-Maxwell
J. Wojtylak
G. Yararli
R. Yepes-Enriquez

Considering the fax of 10 April 2000 in which the OPCW indicated that it had no comments to make on the above applications;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Mr Dunseth, an American who was born in 1945, works at the OPCW as a Senior Safety Officer (Chemical Weapons) at grade P.4.

Mr Mattmann, who was born in 1967 and is a French citizen, works at the OPCW as a Storage Specialist at grade G.5.

At the end of 1997, the Director-General informed the staff of his decision to commission a classification review of most of the existing posts. The review was entrusted to a consultant.

By an internal memorandum of 6 August 1998, the Director-General informed the staff of the results of the review. Attached to the memorandum was a summary table of the recommended reclassification for each of the posts reviewed. On the same day the Director-General convened a meeting of the entire staff at which he announced his decision to apply as such, from 1 January 1999, the results of the review contained in the attachment to the memorandum. On 7 August the Administration published a note entitled "Classification review of posts in the OPCW" which contained the consultant's full report and in which the Director-General notified in greater detail the decision he had announced orally on the previous day. He thus decided as of 1 January 1999, inter alia, to reclassify posts where the review so recommended and he also undertook to put in place, as of the same date, procedures and guidelines for the promotion of certain categories of officials. The posts to be upgraded included those of the complainants. In fact, according to the results of the review it was recommended that Mr Dunseth's post should be upgraded to P.5 and that Mr Mattmann's post should be upgraded to G.7.

The Executive Council and then the OPCW's Conference of the States Parties at its third Session, held from 16 to 20 November 1998, decided to take a decision on the reclassification of posts at a later stage, in the context of future programme and budget negotiations. Accordingly the Director-General was asked not to reclassify any posts in the meantime.

Noting that their posts had not been reclassified at 1 January 1999, the complainants – Mr Mattmann on 2 February 1999 and Mr Dunseth on 10 February – submitted a request to the Director-General to proceed with the reclassification of their posts in accordance with his decision of 7 August 1998. By letters of 17 March the Director-General asked them to allow him an extension of time until 3 May 1999 in order to consider their request to which they tacitly agreed. By memoranda of 28 and 31 May respectively, Mr Mattmann and Mr Dunseth asked the Director-General to allow them to appeal directly to the Tribunal. By internal memoranda of 31 May – the impugned decisions – the Acting Director-General agreed.

B. The complainants contend that, by failing to implement the decision of 7 August 1998, the Organisation made a mistake of law.

First, this decision is lawful. It is based on Regulation 2.1[*] of the Interim Staff Regulations, which confers discretionary authority on the Director-General for the classification of posts. Accordingly, neither the Executive Council of the OPCW nor the Conference of the States Parties may oppose the application of a decision to reclassify posts taken by a competent authority. They could no doubt have modified or revoked the authority conferred by the Staff Regulations on the executive head of the Organisation before he notified the decision to the staff. But they did not, so the rule of *patere legem quam ipse fecisti* requires the decision to be applied. The complainants add that the scope of the Director-General's discretionary authority for reclassification was confirmed by the Organisation's Legal Adviser in an internal memorandum of 22 April 1999.

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[*] Regulation 2.1 at the material time read as follows: "In conformity with principles laid down by the Organisation, and in accordance with the master standards of job classification as developed by the International Civil Service Commission, and with due regard for the need for economy and efficiency, the Director-General shall make appropriate provision for the classification of posts according to the nature of the duties and responsibilities required."

Furthermore, since neither the Administration nor any member of the staff challenged the decision within the time limit for litigation, it became a final one.

Secondly, the decision of 7 August 1998 undeniably created rights for the complainants. The results of the classification review, and particularly the summary table, recommended that the complainants' posts should be upgraded, as of 1 January 1999, from grade P.4 to grade P.5 in Mr Dunseth's case and from grade G.5 to grade G.7 in the case of Mr Mattmann.

Thirdly, by failing to execute the decision, the Organisation caused the complainants actual injury.

The complainants ask the Tribunal to quash the Director-General's decisions notified in the internal memoranda of 31 May 1999 in that there are implied rejections of their requests of 2 and 10 February 1999, and to award them costs.

C. In its replies, in preliminary remarks, the Organisation submits that Regulation 2.1 of the Interim Staff Regulations merely states that the Director-General must take appropriate measures for the classification of posts according to the nature of the duties and responsibilities required. In other words, the provision is unspecific and does not, on its own, determine the Director-General's express powers for post classification.

On receivability, the OPCW contends that the impugned decisions did not cause the complainants injury. The decision of 7 August 1998 means only that the Director-General "decided" to take implementing measures in accordance with the consultant's report, which might result in certain posts being upgraded. Such a decision is not contrary to the complainants' interests, since they are pursuing exactly the same end.

According to the Organisation, what the complainants are in fact asking of the Tribunal is to enjoin the Director-General to take measures to implement the decision of 7 August 1998. Such a claim is beyond the Tribunal's competence. It adds that, for the time being the complainants are no longer in a position to seek measures to implement the decision because both the Conference of the States Parties and the Executive Council decided to postpone discussion of the decision itself – on the classification of posts – and its entry into force.

Consequently, the defendant asks the Tribunal to declare the complaints irreceivable.

On the merits, the OPCW submits that even if the decision of 7 August 1998 may be considered lawful, the measures needed to implement it remain within the competence of the Organisation's supreme authorities – namely the Conference of the States Parties and the Executive Council – until those bodies have approved them and decided on the necessary financing.

It argues that the decision in question may not be regarded as final since it was to be followed by implementing measures, which were not taken because the Conference and the Council intervened under the authority conferred on them by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (hereinafter the Chemical Weapons Convention).

It denies that the decision on reclassification – which is a general decision – created any rights for the complainants, since upgrading is subject to two conditions: first, "the incumbent must perform the duties and responsibilities satisfactorily in relation to his post" and secondly, he must meet the requirements for holding a higher-level post.

In conclusion, the defendant denies that the Director-General made a mistake of law by failing to implement the decision of 7 August 1998 "as a result of the decision taken by the ... Council to suspend its implementation and the measures subsequently taken by the Conference".

It asks for an award of costs against the complainants.

D. In their rejoinders, the complainants maintain that their complaints are receivable because the impugned decisions are individual ones, they affect the complainants adversely and they bear the characteristics of actual decisions. Moreover, the defendant's plea that the issue of the reclassification of posts at the OPCW is still under discussion has no bearing on the receivability of the complaints.

On the merits, they contend that Regulation 2.1 is not unspecific: it is the very basis of the Director-General's authority for the classification of posts.

They point out that it is not their intention to deny that there is a hierarchy among the organs of international organisations. However, once certain rules (including delegation of authority to the Director-General) have been set by the policy-making bodies, in particular the Conference of the States Parties, those bodies may not intervene in a matter for which authority was delegated before such delegation was revoked or modified.

Noting that the Conference decided on 2 July 1999 to amend Regulation 2.1 in order to revoke the Director-General's authority to decide on the classification of posts, they point out that their requests of 2 and 10 February 1999, the impugned decisions of 31 May and their complaints filed on 11 June, all precede the date of the decision to amend that regulation. The material rules are therefore the rules that were in force before the decision of 2 July 1999.

Lastly, they submit that the Organisation fails to draw the necessary distinction between the reclassification of their posts as from 1 January 1999, which forms the central issue of the present case and is automatic, and their promotion, which comes in the wake of this case but is not part of it.

E. In its surrejoinders the Organisation maintains that the complainants have no actual and present interest in the reclassification of their posts, since the measure on which they rely is suspended.

It indicates that, on 24 September 1999 the Executive Council, recalling the decision taken on 2 July 1999 by the Conference of the States Parties, took a decision whereby it entrusted to the Director-General the task of carrying out a new post classification review. The complaints are therefore not only irreceivable but also premature in terms of their merits.

The Organisation presses its plea that there is no decision which actually confers on the complainants any right to the reclassification of their posts.

CONSIDERATIONS

1. Following a review of the classification of posts at the OPCW, the Director-General told staff on 6 and 7 August 1998 that he had decided to "implement all the grade changes recommended in the staffing chart attached to the annexed consultant's report". This decision was to take effect on 1 January 1999. However, concerned at the budgetary implications, the member States asked the Director-General in November 1998 not to reclassify any posts pending further discussions on the Organisation's budget and work programme. Subsequently they asked him in July 1999 to commission a new classification review after approval by the Executive Council of its terms of reference and scope. As a consequence, the reclassification of 118 posts recommended by the consultant was not implemented as announced on 6 and 7 August 1998.

2. Two members of the staff of the OPCW whose posts were to be reclassified submitted requests to the Director-General on 2 and 10 February 1999 which were implicitly rejected by decisions allowing them to appeal directly to the Tribunal. They have filed two complaints, which the Tribunal will join.

3. The gist of the complainants' pleas is that rights were conferred on them by the note of 7 August 1998, which they deem to be a lawful and final decision taken by the Director-General in the exercise of his authority which was not subject to any subsequent challenge.

4. In rebuttal, the Organisation raises several objections to receivability. All of them fail. First of all, it submits that the impugned decisions do not injure the complainants since, far from impairing their interests, these are the bases for their claims. That argument would hold only if the complainants intended to challenge the decision contained in the note of 7 August 1998, which is not the case. On the contrary, they rely on that decision to challenge the Organisation's rejection of their claim to benefit from it. The OPCW appears to concur but then goes on to plead that the complainants have no actual and present interest in challenging the suspension of the implementation of the decision in question, that was

decided by the Conference of the States Parties. But the complainants do have an interest in challenging a refusal to implement the reclassification of their posts and entering whatever pleas they like in support: whether or not they may rely on the note of 7 August 1998 is an issue of substance, on which the Tribunal will rule, and not one of receivability. Lastly, the defendant objects to the receivability of their claims to the Tribunal to order the Director-General to satisfy their requests. But it overlooks the fact that when a decision, be it favourable or adverse, affects the career of an international civil servant, the latter may apply to the Tribunal to set it aside. What the complainants are asking the Tribunal here is precisely to set aside the decisions refusing to implement the reclassification of their posts as from 1 January 1999. They are entitled to do so and their complaints are receivable.

5. On the merits, the positions of both parties are clearly argued. The complainants emphasise that the note of 7 August 1998 confirming an internal memorandum of 6 August addressed to the staff, presented the implementation of the changes recommended by the consultant as a decision taken by the Director-General. They submit that the decision fell within the competence of the Director-General by virtue of Regulation 2.1 of the Interim Staff Regulations and that it created rights for the staff members concerned.

In rebuttal, the Organisation recalls that the Director-General's powers must be appraised bearing in mind the authority of the Conference of the States Parties, which, according to Article VIII(19) of the Chemical Weapons Convention, is "the principal organ of the Organisation" and may consider any questions "relating to the powers and functions of the Executive Council and the Technical Secretariat". Since the Director-General is the head of the Technical Secretariat, the Conference had the power to consider matters falling within his competence. Moreover, the Executive Council has responsibility for overseeing the proper functioning of the Convention which includes, if not expressly at least by implication, the need to be able to count on qualified staff. It follows, says the Organisation, that the Director-General could not apply measures to implement his decision of 7 August 1998 until the supreme authorities of the Organisation had approved them or decided on their financing. Accordingly, the decision of 7 August could not be regarded as final and did not create rights for the complainants, particularly as posts could be upgraded only on condition that the incumbents performed their duties satisfactorily and met the requirements for holding a higher post.

6. The Tribunal observes first that, whatever the general supervisory powers of the Conference of the States Parties or the Executive Council, in August 1998 there was no doubt as to the Director-General's competence for the classification of posts: Regulation 2.1 of the Interim Staff Regulations in force at the time said "the Director-General shall make appropriate provision for the classification of posts according to the nature of the duties and responsibilities required". It is true that this regulation was later replaced by Regulation 2 of the new Staff Regulations which revokes the Director-General's authority and states that he "shall prepare and submit to the Executive Council for its consideration and approval, proposals for the classification of posts", but this new regulation came into force only on 2 July 1999. At the time of the decision cited by the complainants, the Interim Staff Regulations applied. In the exercise of his statutory authority the Director-General, to use the terms of the note of 7 August 1998 "decided as of 1 January 1999, to implement all the grade changes recommended" by the consultant, including those affecting the posts held by the complainants. That decision, which was lawful, became final as it was not contested by the persons concerned, and it was sufficiently specific to confer on them rights which could not be challenged by a later decision to postpone implementation of the reclassification pending a further review.

7. One might legitimately wonder about the consequences of the reclassification since, as the Organisation rightly says, the decision of 7 August draws a distinction between reclassifying posts and promoting eligible incumbents: paragraph 4.5 of the note states that the "incumbent of each post that has been classified at a higher level than its current grade will be promoted to the higher grade, provided that his/her current performance with respect to the functions and responsibilities of the post is satisfactory and provided that the incumbent meets the qualification requirements for the higher grade". But the complainants point out that they draw a distinction between the right to reclassification of their post, which must be automatic,

and their promotion, which they concede is not part of the present case. The Tribunal notes that they expressly limit their claims and it is bound to conclude that the decision of 7 August 1998 had the effect of reclassifying their posts as from 1 January 1999, there being no subsequent decision which can legally rescind the post classification.

8. Since their complaints succeed, the complainants are entitled to costs, which the Tribunal sets at 20,000 French francs.

9. Since the complaints succeed, so too must the applications to intervene insofar as the interveners are in the same position in law and in fact as the complainants.

DECISION

For the above reasons,

1. The decisions of the Director-General of the OPCW rejecting the requests filed on 2 and 10 February 1999 by the complainants are set aside.
2. The OPCW shall pay the complainants an overall amount of 20,000 French francs in costs.
3. The applications to intervene are allowed if the interveners are in the same position in law and in fact as the complainants.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative

EIGHTY-NINTH SESSION

***In re* Allen**

Judgment No. 1988

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Robert Allen against the Organisation for the Prohibition of Chemical Weapons (OPCW) on 11 June 1999 and corrected on 12 October, the OPCW's reply of 30 November 1999, the complainant's rejoinder of 11 February 2000 and the Organisation's surrejoinder of 30 March 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Considering the applications to intervene filed by:

V. A. Khers
S. Ahmed
A. Al-Hamdawi
S. Amoura
M. Birsanu
D. J. Bonarek
E. Casareno
P. Cermák
M. del C. Chueca Ibáñez
M. Connell
I. Culjak
R. P. Dawadi
I. Doudakov
R. Dururu
E. Farkaš
M. Gonzalez
L. Gorniak
J. Guo
Z. Han
J. L. García Hernández
R. Islam
J. Jiricek
K. J. Keltti
M. Khurlee
K. S. Kim
J. Kledrowetz

K. F. Kouadio
H. Lampalzer
I. Lancaric
S. Laribi
D. N. Le
I. Lee
L. LeMarie
N. Măruntelu
J. McKenzie
D. L. Mears
T. Mikeš
S. Mogl
D. Mohn
V. Mokrousov
S. Mortillaro
Y.-L. Mu
I. Mutibvu
B. Nair
J. A. Ohno
J. G. Osborne
S. Parker
J. Peregrino
O. Rams
H. Reriani
D. Rothbacher
M. Rouzbahani
V. Rutkevich
K. Sayid
A.-M. Sîmoiu
V. Sudhakar
R. Sullivan
C. Takawira
M. Vlasov
B. Whelan
C. Wickramage
W. Wuryani
J. Yang
C. Yepez
J. F. Zhang

Considering the letter of 30 March 2000 in which the OPCW indicated that it had no comments to make on the above applications;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an American who was born in 1965, works at the OPCW as an inspector at grade P.3.

At the end of 1997 the Director-General informed the staff of his decision to commission a classification review of most of the existing posts. The review was entrusted to a consultant.

By an internal memorandum of 6 August 1998 the Director-General informed the staff of the results of the review. Attached to the memorandum was a summary table of the recommended reclassification for each of the posts reviewed. On the same day the Director-General convened a meeting of the entire staff at which he announced his decision to apply as such, from 1 January 1999, the results of the review contained in the attachment to the memorandum. On 7 August the Administration published a note entitled "Classification review of posts in the OPCW" which contained the consultant's full report and in which the Director-General notified in greater detail the decision he had announced orally on the previous day. He thus decided, as of 1 January 1999, inter alia, to set procedures and guidelines in place so that grade P.3 becomes the entry level for all newly recruited inspectors. Furthermore, he indicated that these procedures and guidelines would also provide for the promotion of such inspectors to grade P.4 after an agreed number of years' experience in the post, and subject to satisfactory performance.

The Executive Council and then the OPCW's Conference of the States Parties at its third Session, held from 16 to 20 November 1998, decided to take a decision on the reclassification of posts at a later stage, in the context of future programme and budget negotiations. Accordingly, the Director-General was asked not to reclassify any posts in the meantime.

Noting on 1 January 1999 that no procedures and guidelines on the promotion of grade P.3 inspectors had been introduced, the complainant, on 16 March 1999, submitted a request to the Director-General to put in place the procedures and guidelines for the promotion of inspectors, in accordance with his decision of 7 August 1998. By a letter of 17 March the Director-General asked the complainant to allow him an extension of time until 3 May 1999 in order to consider his request to which the complainant tacitly agreed. By a memorandum of 28 May the complainant asked the Director-General to allow him to appeal directly to the Tribunal. By an internal memorandum of 31 May – the impugned decision – the Acting Director-General agreed.

B. The complainant submits that by failing to implement the decision of 7 August 1998 the Organisation made a mistake of law.

In the first place, this decision is lawful. It is based on Regulation 2.1* of the Interim Staff Regulations, which confers discretionary authority on the Director-General for the classification of posts. Accordingly, neither the Executive Council of the OPCW nor the Conference of the States Parties may oppose the application of a decision to reclassify posts taken by a competent authority. They could no doubt have modified or revoked the authority conferred by the Staff Regulations on the executive head of the Organisation before he notified the decision to the staff. But they did not, so the rule of *patere legem quam ipse fecisti* requires the decision to be applied. The complainant adds that the scope of the Director-General's discretionary authority for reclassification was confirmed by the Organisation's Legal Adviser in an internal memorandum of 22 April 1999.

Furthermore, since neither the Administration nor any member of the staff challenged the decision within the time limit for litigation, it became a final one.

Secondly, the decision of 7 August 1998 undeniably created rights for the complainant since it indicates that the Director-General was to put in place, as from 1 January 1999, rules for the promotion of grade P.3 inspectors, of which the complainant was one, to grade P.4.

Thirdly, by failing to implement the decision in question, the Administration caused the complainant actual injury.

Fourthly, the complainant draws the attention of the Tribunal to the fact that many grade P.3 inspectors at the OPCW are already performing the duties of a grade P.4 inspector, regardless of the number of years they have served or the evaluation of their work.

He asks the Tribunal to quash the Director-General's decision notified by the internal memorandum of 31 May 1999 insofar as it is an implied rejection of his request of 16 March 1999, and to award him costs.

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* Regulation 2.1 at the material time read as follows: "In conformity with principles laid down by the Organisation, and in accordance with the master standards of job classification as developed by the International Civil Service Commission, and with due regard for the need for economy and efficiency, the Director-General shall make appropriate provision for the classification of posts according to the nature of the duties and responsibilities required."

C. In its reply the Organisation submits in preliminary remarks that Regulation 2.1 of the Interim Staff Regulations merely states that the Director-General must take appropriate measures for the classification of posts according to the nature of the duties and responsibilities required. In other words, the provision is unspecific and does not, on its own, determine the Director-General's powers for post classification.

The OPCW explains that, contrary to what the complainant asserts, the Director-General's note of 7 August 1998 does not address promotion as such. In this context promotion must be understood as the consequence of the adjustment of the grade of the incumbent of a post which is to be upgraded. However, this adjustment is not automatic, since promotion as meant in the note is a conditional consequence of the post reclassification.

On receivability, the Organisation submits that the impugned decision does not affect the complainant, since his only objection is the absence, within the time frame set by the Director-General, of proper implementing measures which would have permitted a post reclassification with the consequence that promotion from grade P.3 to P.4 became a possibility for the complainant provided that he met the requirements. The decision of 7 August 1998 means only that the Director-General "decided" to take implementing measures in accordance with the consultant's report. Such a decision is not contrary to the complainant's interests, since he is pursuing exactly the same end.

According to the Organisation, what the complainant is in fact asking of the Tribunal is to enjoin the Director-General to take measures to implement the decision of 7 August 1998. Such a claim is beyond the Tribunal's competence. Besides, such an "injunction" would be *ultra vires* and unjustifiable in view of the decisions taken by the member States and the Executive Council, which led precisely to the suspension of the measures in question. Besides, even if the measures are taken, they will not guarantee the complainant any "right to promotion".

Consequently, the OPCW asks the Tribunal to declare the complaint irreceivable.

On the merits, the OPCW submits that, even if the decision of 7 August 1998 may be considered lawful, the measures needed to implement it remain within the competence of the Organisation's supreme authorities – namely the Conference of the States Parties and the Executive Council – until those bodies have approved them and decided on the necessary financing.

It argues that the decision in question cannot be regarded as final because it was to be followed by implementing measures, which were not taken owing to intervention by the Conference and the Council under authority conferred on them by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

According to the OPCW it is plain that the decision of 7 August 1998 created no rights for the complainant, even if it provides for procedures and guidelines for all newly recruited inspectors to be appointed at grade P.3 (which is not the complainant's case), and allows for the subsequent promotion of such inspectors (which is the complainant's case). The "decision" itself sets conditions and implies the implementation of measures which preclude any automatic entitlement for the complainant.

The defendant denies that the Director-General made a mistake of law by failing to implement the decision of 7 August 1998 "as a result of the decision taken by the ... Council to suspend its implementation and the measures subsequently taken by the Conference".

Lastly, the Organisation argues that the complainant's assertion that many grade P.3 inspectors already perform the duties of a grade P.4 inspector pertains to an issue that cannot be settled in the absence of measures to determine, on the basis of proper procedures and guidelines, the officials whose posts may be reclassified and who may accordingly be eligible for promotion.

It asks for an award of costs against the complainant.

D. In his rejoinder the complainant maintains that his complaint is receivable: the impugned decision is an individual one, it affects him adversely and it bears the characteristics of an actual decision. Moreover, the defendant's plea that the issue of establishing procedures and guidelines providing for grade P.3 inspectors to have access to grade P.4 at the OPCW is still under discussion has no bearing on the receivability of the complaint.

On the merits he contends that Regulation 2.1 is not unspecific: it is the very basis for the Director-General's authority for the classification of posts.

He points out that it is not his intention to deny that there is a hierarchy among the organs of international organisations. However, once certain rules (including delegation of authority to the Director-General) have been set by the policy-making bodies, in particular the Conference of the States Parties, those bodies may not intervene in a matter for which authority was delegated before such delegation was revoked or modified.

Noting that the Conference decided on 2 July 1999 to amend Regulation 2.1 in order to revoke the Director-General's authority to decide on the classification of posts, he points out that his request of 16 March 1999, the impugned decision of 31 May and his complaint, filed on 11 June, all precede the date of the decision to amend that regulation. The material rules are therefore the rules that were in force before the decision of 2 July 1999.

The complainant submits that the Organisation fails to draw the necessary distinction between the establishment, on 1 January 1999, of procedures and guidelines to govern, inter alia, access by grade P.3 inspectors to grade P.4, which forms the central issue of the present case and is automatic, and the complainant's possible promotion following consideration of his case on the basis of those procedures and guidelines, which comes in the wake of the present case but is not a part of it. The complainant points out in this connection that he never submitted that he had a right to automatic promotion, but only to the introduction of procedures and guidelines governing the access of grade P.3 inspectors to grade P.4.

E. In its surrejoinder the Organisation maintains that the complainant has no actual and present interest in his "promotion", since the measure on which he relies is suspended.

It indicates that, on 24 September 1999 the Executive Council, recalling the decision taken on 2 July 1999 by the Conference of the States Parties, took a decision whereby it entrusted to the Director-General the task of carrying out a new post classification review. The complaint is therefore not only irreceivable but also premature in terms of the merits.

The Organisation presses its plea that there is no decision under which the complainant may claim any right to "promotion" to grade P.4 subsequent to a post reclassification.

CONSIDERATIONS

1. As in *in re* Dunseth and Mattmann (Judgment 1987 delivered this day), the complainant is an employee of the OPCW who cites the terms of a note issued by the Director-General on 7 August 1998 in order to assert his right to reclassification. However, unlike his colleagues in the above-mentioned case, who invoked the decision to apply changes of grade recommended by a consultant who had reviewed the Organisation's classification of posts, the complainant relies on a paragraph of the note in which the Director-General decided to:

> "set procedures and guidelines in place for the P.3 grade to be the entry level for all newly recruited inspectors. These procedures and guidelines will also provide for the promotion of such inspectors, after an agreed number of years' on-the-job experience, and further subject to satisfactory performance, to the P.4 grade."

2. Noting the absence of any procedures or guidelines on the promotion of grade P.3 inspectors to grade P.4, the complainant, who had been recruited in July 1998 at grade P.3, requested the Director-General to review his decision not to implement the note of 7 August 1998. The Organisation raises the same objections to receivability as in the case that gave rise to the above-mentioned judgment, and the Tribunal's response to them is, *mutatis mutandis*, the same as its response in that judgment.

3. As to the merits, the complainant's position in law is different from the one discussed in Judgment 1987. The note of 7 August 1998 provided for the reclassification of the posts, of the officials concerned, to be implemented directly. However, it goes much less far when providing for the establishment of procedures whereby certain categories of officials may, after a number of years' experience on-the-job, have access to a higher grade. To provide for such procedures is undoubtedly very desirable, but the note of 7 August 1998 did not bind the Organisation to any deadline for the preparation of guidelines or to any modalities for the procedure, and created no right to promotion or to reclassification for the staff concerned. In these

circumstances, and even if it is a fact that some grade P.3 inspectors perform the duties corresponding to posts at grade P.4, the complainant may claim no right to promotion, nor any right to the establishment, within a specified period, of a procedure to consider his eligibility for promotion to grade P.4. The fact that the note of 7 August stated that the decisions were to take effect from 1 January 1999 did not necessarily imply an obligation for the Administration to put in place procedures from which officials of the complainant's category could in any case only benefit after a number of years' experience.

The complainant can claim no breach of any rights. The Tribunal therefore concludes that the complaint must be dismissed. It finds no reason, in the circumstances, to award costs against the complainant.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The Organisation's counterclaim is dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Ferro** **Judgment No. 1989**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Antonio Ferro against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 22 May 1999, Eurocontrol's reply of 20 August, the complainant's rejoinder of 29 October and the Agency's surrejoinder of 23 December 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Articles 59 and 60 of the Staff Regulations governing officials of the Agency state:

> "Article 59
>
> 1 An official who provides evidence of incapacity to perform his duties because of sickness or accident shall automatically be entitled to sick leave.
>
> The official concerned shall notify the Agency of his incapacity, as soon as possible and at the same time state his present address. He shall produce a medical certificate if he is absent for more than three days. He may be required to undergo a medical examination arranged by the Agency.
>
> 4 Officials shall undergo any medical check-up required by the Agency, to be carried out either by a medical practitioner designated by the Agency or by a medical practitioner chosen by the official concerned."

> "Article 60
>
> Except in case of sickness or accident, an official may not be absent without prior permission from his immediate superior. Without prejudice to any disciplinary measures that may apply, any unauthorized absence which is duly established shall be deducted from the annual leave of the official concerned. If he has used up his annual leave, he shall forfeit his remuneration for an equivalent period.
>
> If an official wishes to spend sick leave elsewhere than at the place where he is employed he shall obtain prior permission from the Director General."

The complainant, a Portuguese citizen born in 1964, is employed as an administrative assistant 2nd class, at grade B5, at the Agency's Central Route Charges Office at Brussels.

On 6 May 1998 his doctor drew up a certificate stating that, owing to illness his patient was unfit for work for the period from 6 May to 12 June 1998. On 19 May the complainant's supervisor sent a memorandum to the Agency's medical adviser asking him to find out from the doctor who had issued the certificate whether the complainant's absence was likely to be prolonged. On 9 June the complainant's doctor issued a second medical certificate, similar to the first, for the period from 13 June to 2 August 1998. On 10 June the complainant went to Portugal without obtaining permission from of the Director General. On 23 June the medical adviser wrote to him in Lisbon saying that he wished to see him "as soon as possible" and asking him to contact the Medical Service to arrange an appointment. The complainant says that he received the letter on 7 July and was unable to contact the Medical Service. In a letter of 23 July which he sent to Brussels and to Lisbon the Director of Human Resources explained to the complainant that because he had not undergone a medical examination and had left for Portugal without obtaining permission, his pay would be suspended as from August 1998 and until he clarified matters with the Agency. The postal services of both countries returned the letters as "not claimed".

On 3 August the complainant went back to work and saw the medical adviser. He offered to supply the medical adviser with a report on his state of health from his own doctor. On the same day he realised that he had not been paid for the month of August 1998. The following day he made enquiries at the Human Resources Department and was informed that the Director of that Department had decided to suspend his pay because he had not answered the Agency's letters. By a letter of 6 August the Director of

Human Resources told him that, according to the medical adviser, it was impossible to take a decision about medical facts dating back to 10 June. He asked him to sign a "joint statement", appended to the letter, whereby he would acknowledge that he had been absent from 10 June to 2 August without leave and would accept the financial consequences. For its part the Agency would undertake to defer total recovery of the undue payments in respect of his salary for the period in question and would deduct an amount from his monthly salary as from 1 August 1998 until the debt was paid back. On 13 August the complainant's doctor sent the medical adviser a report on his patient's clinical status.

By a letter of 18 August the complainant asked the Director of Human Resources to reconsider his decision and order the payment of his salary for August 1998. In a letter of 20 August the Director upheld his decision to treat the absence as unauthorised, but only as from 8 July, the day after the complainant received the letter of 23 June 1998. A corresponding amount would be deducted from his remaining annual leave and his pay. He would receive his monthly salary minus 3,000 Belgian francs until the debt was discharged. On 20 November the complainant submitted an internal complaint to the Director General against the decision of 20 August 1998 of the Director of Human Resources. His appeal was referred to the Joint Committee for Disputes, which at its meeting of 22 January 1999 recommended rejecting it as devoid of merit. By a letter of 23 February 1999, the impugned decision, the Director of Human Resources informed the complainant that the Director General had rejected his appeal.

B. The complainant has but one plea: breach of Articles 59 and 60 of the Staff Regulations. Citing the case law of the Court of Justice of the European Communities and of the Tribunal, he submits that a medical certificate "is in theory worthy of credence and presumed to be lawful". The Administration may treat the absence of an official who has produced a medical certificate as unauthorised, if the official has made a medical examination impossible, for example by taking his sick leave outside his duty station without first seeking permission or indicating where he will be, or by ignoring a summons to undergo a medical examination. But the absence cannot be deemed unauthorised unless: the Administration actually intended to carry out an examination; the letter summoning the official was sufficiently clear; and the medical check-up could not be carried out at a later date.

The complainant contends that the purpose of the letter of 19 May 1998 was to determine whether his absence was likely to be prolonged and not whether his medical certificates were valid. He alleges an obvious error of fact: the letter of 23 June 1998 did not summon him to a medical check-up for the purpose of verifying the validity of the certificates. He submits that the Agency should have given him the opportunity to prove that he was ill by arranging a further examination. The defendant also drew obviously wrong conclusions from the examination of 3 August by stating that it was no longer possible to come to a decision about medical facts dating back to 10 June. Its decision was premature. It should have waited for the conclusions of the medical adviser, who, having asked for a clinical report from the complainant's doctor was therefore bound to take account of it in his decision.

Lastly, the decision of 6 August 1998 betrays "a blatant lack of care" towards him when he was in a "distressful" situation because three quarters of his pay had been withheld for several months.

He asks the Tribunal to quash the decisions of 20 August 1998 and 23 February 1999 and order the Agency to pay him the amounts withheld, or to be withheld, from his pay, plus interest at the rate of 8 per cent a year "as from the dates at which [his] salary was or will be due and until it has been paid to him in full". He claims 100,000 Belgian francs in provisional material and moral damages. He seeks an award of costs.

C. In its reply the Agency observes that the complainant admitted that his departure to Portugal, without leaving an address where he could be reached if necessary, precluded any medical examination and his absence may therefore be treated as unauthorised. That being so, the substance of his defence is that the Agency failed to demonstrate clearly its intention to refer him for a medical examination within the meaning of Article 59 of the Regulations.

The letter of 19 May 1998 asked the medical adviser to get the complainant to undergo a medical examination. As for the letter of 23 June 1998, although it was not worded as a formal summons, it was nonetheless an "urgent and unambiguous invitation" to get in touch with the medical adviser to arrange an examination. Knowing that if he contacted the Medical Service he would be asked to return to Brussels immediately for an examination, he deliberately refrained from doing so. The Agency states that, in view of the nature of the illness he alleged, a later examination would afford no information allowing it to ascertain whether he was fit for work at the time when he was covered by a medical certificate.

The report by the complainant's doctor shows that the sick leave was above all a "social" measure for the purpose of letting him go to Portugal to settle some family matters, his annual leave for 1998 having been exhausted. The Agency denies that the medical adviser requested a report so that he could determine whether the absence was authorised.

It also denies failing in its duty of care towards him, pointing out that his misconduct could have earned him a disciplinary sanction.

D. In his rejoinder the complainant explains that he did not respond immediately to the medical adviser's letter of 23 June 1998 because it was not "peremptory". His departure for Portugal was prompted not by any improper intentions but by medical reasons in that he needed to settle his family problems which would help him to get cured.

He notes that there is no report by the medical adviser stating that a later examination would not afford any useful information as to his fitness for work. The Agency therefore carried out an evaluation of medical facts, which it has not the authority to do.

E. In its surrejoinder Eurocontrol presses its arguments and concludes that the decision of 20 August 1998 was "sound, lawful and disproportionate" given the complainant's attitude.

CONSIDERATIONS

1. The complainant, a Portuguese citizen, is employed by Eurocontrol as an administrative assistant 2nd class, at the Agency's Central Route Charges Office at Brussels.

On 6 May 1998 he obtained from his doctor a medical certificate putting him on sick leave until 12 June 1998.

On receiving the certificate his supervisor sent a memorandum on 19 May 1998 to the Agency's medical adviser so as to determine what consequences the complainant's absence might have on the proper running of the service.

On 25 May 1998 the medical adviser wrote to the complainant asking him to make an appointment and to bring all the medical documents in his possession. He sent the letter to the complainant's home but got no reply.

On 9 June 1998 the complainant's doctor issued a new medical certificate putting him on sick leave up to and including 2 August 1998. On 15 June 1998 the complainant's supervisor again sent a memorandum to the medical adviser.

On 23 June the medical adviser wrote to the complainant at an address in Lisbon which he had got from one of the complainant's colleagues. The complainant got the letter on 7 July 1998 and he asserts that he tried once to contact the Medical Service on the same day but his single telephone call went unanswered.

Having received no response from the complainant, on 23 July 1998 the Director of Human Resources wrote him a letter which he sent both to Brussels and to Lisbon. It said that the Agency was treating his absence as unauthorised because he had failed to undergo a medical check up and was suspending payment of his salary until he explained himself. The Belgian and Portuguese postal services returned the letters as "not claimed".

On 3 August 1998 the complainant went back to work and contacted the medical adviser. On 4 August 1998 he was informed that the Agency considered that he had failed to undergo the medical examination prescribed in Article 59(1) of the Staff Regulations and that his sick leave was unauthorised because he had spent it outside his duty station without prior permission.

2. On 6 August 1998 the Director of Human Resources wrote to the complainant confirming that his absence during the period from 10 June 1998, the date on which he left for Portugal without prior permission, to 2 August 1998 was being treated as unauthorised absence. It would consequently be deducted from his remaining annual leave and when that had been exhausted, "the remaining amount of overpaid salary [would] be calculated ... and deducted each month from the fraction of [his] remuneration not under distraint". The arrangements for the repayment were specified in an annex which the complainant was to sign.

3. On 18 August 1998 the complainant asked the Director of Human Resources to reconsider his decision to treat his absence of 10 June to 2 August 1998 as unauthorised and recalling the duty of care that an organisation owes to its staff, asked him to order payment of his salary for August 1998.

By a letter of 20 August 1998 the Agency agreed to treat his absence as unauthorised only from 8 July 1998, the day after the complainant had received the medical adviser's letter, and to pay him his salary for August 1998 minus the amounts deducted in respect of his creditors. From August onwards, the sum of 3,000 Belgian francs was to be deducted monthly from the fraction of his salary that was not under distraint.

4. Dissatisfied with this arrangement, on 20 November 1998 the complainant filed an internal complaint against the decision of 20 August 1998. On the unanimous recommendation of the Joint Committee for Disputes, the Director General rejected the appeal by a decision of 23 February 1999, which the complainant is now challenging before the Tribunal.

5. He asks the Tribunal to quash the decisions of 20 August 1998 and 23 February 1999 and to order the Agency to repay him the amounts deducted or to be deducted from his salary, plus interest at the rate of

8 per cent a year "as from the dates at which [his] salary was due or will be due and until it has been paid [to him] in full". He claims 100,000 Belgian francs in provisional material and moral damages. He also seeks an award of costs.

He pleads breach of Articles 59 and 60 of the Staff Regulations and submits that the Agency made an obvious mistake of fact in that the purpose of the letter of 23 June 1998 was not to verify the validity of the medical certificates; that the decisions in question disregarded the conclusions of a medical examination and that the Agency took them prematurely, without giving him the opportunity to prove that he was ill.

6. It is clear from Articles 59 and 60 of the Staff Regulations, reproduced under A, that an official of Eurocontrol cannot be treated as being on unauthorised leave when he proves that his absence was caused by sickness or accident. However, mere production of a medical certificate does not constitute irrefutable proof that the official is unable to work because of illness. The Administration is free to demand that he undergo a medical examination in order to ascertain that he is indeed ill. And for the Agency to be able to arrange a medical examination, the official claiming incapacity for work must so inform the Administration notifying it of his whereabouts, and must obtain prior permission from the Director General if he wishes to spend sick leave elsewhere than at the place of his employment.

7. It is common ground that the complainant, who produced a medical certificate as evidence of incapacity due to sickness, left his place of employment – Brussels – to go to Portugal without obtaining prior permission from the Director General and failed to provide his address in Portugal so that he could be reached in good time should a medical examination prove necessary.

It is also common ground that: when the complainant received the medical adviser's letter of 23 June 1998 asking him to get in touch with the Medical Service in order to arrange an appointment to which he was to bring all the medical documents in his possession, he made one unsuccessful phone call and then waited until the end of his sick leave before contacting the medical adviser; and that by such behaviour he prevented the Agency from arranging a medical examination before the end of his sick leave.

8. The complainant acknowledges that an official who prevents the Administration from arranging a medical examination to ascertain incapacity for work may be regarded as having taken unauthorised leave. But he considers that that was not his case. He contends that the letter of 23 June 1998 was not intended as a summons to a medical check up; and that even if he did fail to respond to it properly, that was not sufficient ground for treating his absence as unauthorised. In his submission, the letter was a follow-up to the internal memorandum of 19 May 1998 from his supervisor and was bound to have had the same purpose, namely to inquire whether a prolonged absence was to be expected.

9. The Tribunal observes that, regardless of the content of the memorandum of 19 May 1998, the evidence indicates that the Agency – through its medical adviser, though that is immaterial – informed the complainant in unambiguous terms that it intended to use its authority under Article 59 of the Staff Regulations to require him to undergo a medical examination.

By leaving his duty station without prior permission – in breach of Article 60 of the Staff Regulations – by failing to indicate his whereabouts – as Article 59 requires – and by failing to respond properly to the letter of 23 June 1998 – which reached him on 7 July 1998 and which asked him to make an appointment with the medical adviser – the complainant prevented the Agency from arranging a timely medical examination. The Agency therefore deemed that it was entitled to treat the complainant's absence during the period from 8 July to 3 August 1998 as unauthorised absence.

The reference to Judgment 652 (*in re* Toti) is irrelevant. In the present case the Agency decided to require a medical visit during the complainant's sick leave, whereas in the case ruled on in Judgment 652 the Tribunal made the point that the defendant organisation "did not refer the matter to its medical adviser until ... the last day of the leave period ... [and that] it was not the complainant who prevented the medical adviser from forming an opinion".

10. The complainant submits that, even if he failed to respond to the summons to a medical check-up, his absence could not be treated as unauthorised unless a further medical visit concluded that it was not possible to ascertain *ex post facto* whether he was indeed unfit for work. Furthermore, by considering that his infringement – actual or alleged – of the Staff Regulations constituted adequate ground for such a conclusion, the Agency made a mistake of law.

The Tribunal finds no mistake on the Agency's part. It is plain on the evidence that the complainant did not see the medical adviser until 3 August 1998. Eurocontrol quite properly decided to require the complainant to undergo a medical examination during his sick leave. As from 25 May 1998 it did its utmost – as the evidence shows – to arrange an examination, but was prevented from doing so by the complainant in breach of the Staff Regulations. It was therefore entitled to consider the medical certificate relied on by the complainant as inconclusive and to treat the complainant as having been on unauthorised leave from the date on which the medical adviser's letter reached him.

11. The fact that the medical adviser agreed to receive a report from the complainant's doctor without having requested it and that he gave his opinion without waiting for the report affords no grounds for finding the impugned decision unlawful. That decision was based on the provisions of the Staff Regulations and on the case law.

12. The conclusion is that the Agency properly applied Article 60 of the Staff Regulations to the complainant. Consequently, the Tribunal can allow none of the complainant's claims. Nor does it find any breach of the Agency's duty of care towards the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Giordano** **Judgment No. 1990**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Grazia Giordano against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 24 August 1999 and corrected on 14 September, Eurocontrol's reply of 17 December 1999, the complainant's rejoinder of 25 February 2000, the observations submitted by Mrs T. on 13 March at the Tribunal's request, the complainant's comments of 5 April and the Agency's surrejoinder of 14 April 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in 1958 and holds both Italian and Belgian nationalities, joined the Agency in July 1991. In January 1992 she was given a career appointment as a typist 1st class at grade C4. She currently holds a grade B3 post.

On 2 February 1998 the Agency published a notice of competition for an assistant at grade B4/B5 in the Safety Regulation Unit. The complainant applied on 2 April. On 18 May the Selection Board drew up a list of suitable candidates. The complainant was on the list and took the selection tests on 10 June. By a letter of 21 August the Head of the Recruitment and Selection Section told her that the Selection Board's final choice was the candidate with the "most complete profile", namely Mrs T.

By an internal memorandum of 25 November 1998, the complainant filed an internal complaint with the Director General against the rejection of her application. She objected that the decision was not substantiated and that the Agency had discriminated against her in that the aptitude tests were set only in English. The matter was referred to the Joint Committee for Disputes, which concluded at its meeting of 23 March 1999 that the appeal was founded as to her plea of language discrimination. By a letter of 24 May 1999, the impugned decision, the Director of Human Resources told her on the Director General's behalf that her internal complaint was rejected.

B. The complainant has two pleas. First, citing the case law she alleges breach of equal treatment. Since the notice of competition did not specify precedence of English over French, she could legitimately expect to be able to sit the selection tests in either French or English as she chose. French being her mother tongue she should have taken the tests mainly in that language. But English was used for both the reasoning tests, only the character profile test was in French. Interviews, on the other hand, were conducted both in English and French. She states that having been put on the list of suitable candidates by the Selection Board, she can only conclude that the results of the tests were decisive in the rejection of her application. Consequently, because the selection process was conducted almost entirely in English, she suffered discrimination vis-à-vis candidates who were able to take the tests in their mother tongue.

Secondly, she points out that the letters of 21 August 1998 and 24 May 1999 did not state the reasons for her rejection, in breach of the Staff Regulations governing officials of the Eurocontrol Agency and the case law.

The complainant asks the Tribunal to quash the decision of 24 May 1999, as well as the rejection of her application for the post of assistant and the appointment of Mrs T. She claims 100,000 Belgian francs in costs.

C. In its reply the Agency submits that the complaint is irreceivable because the complainant failed to lodge her internal complaint within the statutory time limits. She filed only on 25 November 1998, whereas the decision she challenged was taken on 21 August 1998, so the time-limit for appeal ran to 21 November 1998. Furthermore, on 1 June 1999 the complainant was appointed to a post as an assistant at grade B3 as the result of another competition. Consequently, she no longer has a cause of action.

In subsidiary pleas the Agency denies breach of equal treatment. It had to choose between applicants of more than twenty-eight nationalities and in the interests of uniformity decided to set the tests only in English. It did respect equality of opportunity: the results were weighted according to whether or not the candidate's mother tongue was English. It points out that the successful candidate's mother tongue is not English.

Although the decision of 21 August 1998 explained only in general terms why she was turned down, the complainant was given detailed reasons during a talk she had on 28 August with a representative of the Recruitment and Selection Section. She was told that her application had been discarded only because of her character profile test and interview, which had shown that she was apt to lack self-confidence and was not always in control of her emotions. The reasons given in the letter of 24 May 1999 were worded "more neutrally" because it was the Agency's consistent practice to avoid recording in documents to be placed in staff members' personal files any information that might "undermine [their] future chances".

The Agency asks the Tribunal to award all costs against the complainant.

D. In her rejoinder the complainant alleges that the decision of 21 August 1998 was notified to her only at the end of the month. Her internal complaint was therefore not out of time. She maintains that she does have a cause of action: the post she wanted affords better career prospects than the one she now holds. She adds that she was appointed to her present post one year after the post she wanted was given to Mrs T. During that time she has continued to be paid as a grade C3 employee.

She contends that the selection procedure established in Article 30 of the Staff Regulations and in Rule of Application No. 2 was not respected.

According to those rules, it is the Director General who chooses a candidate from a list drawn up by the Selection Board. But the Board carried out no selection test and the final choice was made by a "Selection Committee", of which there is no mention in the Regulations. To establish such a committee, the Agency should have adopted a rule to amend the Regulations and their Rules of Application after consulting the staff unions in accordance with the Agreement on consultation, conciliation and arbitration procedures concluded by Eurocontrol and the Trade Union Organisations on 9 January 1992. Having failed to do so, it has abused its authority and breached the Agreement.

In the complainant's view, to apply the same treatment to different situations amounts to discrimination. And that is what occurred: candidates of different languages all had to sit most of the tests in English. Having to use English caused her "additional stress and difficulty", which had a negative impact on her results.

She was never given clear and specific reasons for the rejection of her application. The Agency mentioned the alleged lack of self-confidence for the first time in its reply.

E. In her observations Mrs T. states that she fails to see any cause of action: the grade of the complainant's present post is higher than that of the one she initially sought. Being Dutch-speaking and having received part of her higher education in French, she considers that she had no advantage over the complainant in the selection tests conducted in English.

F. In her comments the complainant says that she understands Mrs T.'s reaction but does not share her point of view.

G. In its surrejoinder Eurocontrol presses its plea that the complaint is irreceivable for want of a cause of action. The complainant and Mrs T. both have the possibility of being appointed to a grade B1 post one day, and in that respect the complainant has an undeniable advantage since she is already at grade B3. Furthermore, the complainant may not plead financial injury in that Mrs T.'s salary at grade B5, step 1, amounted to only 64 euros more per year than the complainant's salary at grade C3, step 3.

It denies breach of the selection procedure: the Selection Board drew up a list of suitable candidates and they took the tests and had an interview conducted by a "panel" appointed by the Director General. It was he who chose Mrs T., not the panel, which was "inappropriately" referred to as a "Selection Committee" in the letter of 21 August 1998.

CONSIDERATIONS

1. The complainant, an Italian citizen, spent her childhood in Italy then emigrated to Belgium at the age of ten. She currently holds Belgian nationality as well and deems herself bilingual in Italian and French. She completed secondary education and had further education in English and computer studies. She joined Eurocontrol on 1 July 1991 and was given an indefinite appointment on 23 January 1992 as a grade C4 typist 1st class.

She applied for a number of category B posts that were put up for competition.

The Agency published notice of competition HQ-98-BA/014 for a post of assistant at grade B4/B5 in the Safety Regulation Unit. The notice specified:

> "Applicants must have a good knowledge of English or French, and a working knowledge of the other. During their career, they will ordinarily be called upon to be able to work in both these languages.
>
> An initial selection will be made on the basis of a first assessment of qualifications and experience of all candidates. Thereafter, those candidates considered suitable may be invited to take part in a final selection phase consisting of assessments and interviews. Further details will be given to candidates who are invited to participate."

The complainant applied for the post on 2 April 1998. In her application form she indicated her dual nationality, her native languages (French and Italian) which she rated as "fluent", and her knowledge of other languages which she rated as "very good" for English and Dutch and "good" for German.

A Selection Board was set up to consider the eighty-three applications received and to draw up a list of suitable candidates for the post. The complainant was down as an internal candidate on the list, which is dated 18 May 1998.

On 9 and 10 June a "Selection Committee" – appointed by the Director General and composed of two members representing the relevant departments – interviewed the five candidates (two Belgian, one Dutch, one British and one Irish) whose names were on the list. The candidates then took three assessment tests: the first was a verbal reasoning test given in English; the second, a numerical reasoning test, also in English; and the third, a character profile test, to be taken in a language chosen by the candidate – the complainant chose French. The interviews were carried out in English and French. After consideration of the results of the tests and interviews, the Agency decided to offer the post to another internal candidate whose profile was deemed to be better (Mrs T.).

The complainant was informed that she had been unsuccessful by a letter dated 21 August 1998 and signed on the Director General's behalf. It said that the Selection Committee's final choice had been the candidate "with the most complete profile" and that if she wanted further information, she should contact section HR 1.2.

There is doubt as to the date on which the complainant received that letter – 21 August according to the Agency, at the end of the month according to the complainant.

She took up the offer of further information on the results of the competition. The discussion lasted for one hour and a quarter.

2. On 25 November 1998 the complainant appealed to the Director General against the rejection of her candidature on the grounds that she was not given the reasons for it. She pleaded discrimination: the tests were conducted solely in English, so she was not on a par with the English-speaking candidates. She sought the quashing of the successful candidate's appointment.

The case was referred to the Joint Committee for Disputes, which concluded that there had been discrimination because the final selection tests had been conducted almost exclusively in English. In its opinion, the oral explanation given to the complainant met the minimum obligation to provide reasons, but that in no way prejudged the soundness of the explanation.

The Director of Human Resources nevertheless rejected the appeal on the Director General's behalf, giving the following explanation:

> "contrary to your contention, the English language tests were not decisive in the decision not to appoint you: account was taken of the entire final selection process, which also comprised an interview in the two languages the result of which was not entirely satisfactory
>
> As to the explanation for the rejection of your candidature, it was consistent with the principles established by the case law of the ILO [Administrative Tribunal] concerning the need for restraint."

3. The complainant is asking the Tribunal to set aside the decision of 24 May 1999 rejecting her appeal, to quash the rejection of her candidature and the appointment of Mrs T. and to order the Agency to pay the legal costs. She puts forward the same pleas as in the internal procedure.

The Agency asks the Tribunal to dismiss the complaint as irreceivable on two counts: the internal appeal was out of time and the complainant has no cause of action because, since filing her internal complaint, she has been promoted to a B3 post, which is a grade higher and better paid than the post at issue in the present procedure. On the merits, it submits that the complainant's pleas are unfounded.

In her rejoinder the complainant asserts that the complaint is receivable. She maintains that the selection process comprising the consideration of her application by a Selection Board, then by a "Selection Committee" and lastly by the Director General is in breach of Article 30 of Staff Regulations. The decision to appoint a "Selection Committee" is also in breach of the Agreement on consultation, conciliation and arbitration procedures that Eurocontrol and the Trade Union Organisations signed on 9 January 1992, with the result that the decisions are of no legal weight.

In its surrejoinder the Agency leaves it to the Tribunal to determine the receivability of the complaint in the light of the time limit for the filing of the internal appeal. As to the complainant's interest in obtaining the post in question, the Agency is of the opinion that her chances of promotion are just as good now as they would have been if her application had succeeded, with the advantage that she is starting off from a higher position. On the merits it submits that the selection process was consistent with Articles 30 and 45 of the Staff Regulations, as the Tribunal acknowledged in Judgment 1689 (*in re* Montenez No. 2). The term "Selection Committee" was simply a misnomer, and in any case it is the Director General who takes the decision. It is in fact a "panel appointed by the Director General ('interview board') comprising representatives of the departments concerned". According to the Agency, the interview board was compatible with the Staff Regulations and the Rules of Application. The reports of the interview board which were substantiated and contain assessments of the tests of Mrs T. and Mrs Giordano along with recommendations to the Director General, are appended to the surrejoinder. The board was composed of Mr B. of Bureau EMS.1 and Mr S. of the Human Resources Directorate. The defendant considers that equal treatment was applied in the selection process and that the interview board substantiated its choice.

4. The complainant pleads failure to account for the decision rejecting her application.

A staff member needs to know the reasons for a decision so that he can act on it, for example by challenging it or filing an appeal. A review body must also know the reasons so as to tell whether it is lawful. How ample the explanation need be will turn on circumstances. It may be just a reference, express or implied, to some other document that does give the why and wherefore. If little or no explanation has yet been forthcoming, the omission may be repaired in the course of appeal proceedings, provided that the staff member is given his full say (see Judgment 1817, *in re* Jassogne, under 6). Where a post has been put up for competition, the case law says that when notifying to a serving official the reasons for the rejection of his application, an organisation must be wary of damaging his career prospects (see Judgments 958, *in re* El Boustani No. 3, under 17, 1355, *in re* Suprapto, under 8 and 9, 1390, *in re* More, under 25, and 1787, *in re* Gramegna, under 5).

The letter rejecting the complainant's application was very brief. The Agency nonetheless offered to give her any further information she wanted. The complainant took up the offer and was given details of how the tests were conducted and how she had fared. The Agency has in any case confirmed that information in the course of this complaint, giving the complainant the opportunity to respond if she so wished.

The decision was explained adequately enough for the complainant to challenge it and for the Tribunal to ascertain whether it was lawful.

The plea fails.

5. (a) The Tribunal has already observed that Eurocontrol's appointment and promotion procedure is not inconsistent with the Staff Regulations (see Judgments 1689 and 1771, *in re* De Riemaeker No. 4). It sees no reason to depart from that precedent.

(b) Discounting the precedent set in Judgment 1689 the complainant asserts that:

> "in order to set up a Selection Committee, insofar as the Staff Regulations and its Rules of Application needed to be amended the Agency should have adopted a rule after consulting the Trade Union Organisations, in accordance with the framework agreement signed by the defendant and the Trade Union Organisations on 9 January 1992 ... (see Judgment ... 1712 of 29 January 1998, *in re* Aelvoet No. 6 ...)."

The Agency denies misapplying the statutory provisions on the procedure for filling vacancies. In Judgment 1689 the Tribunal found the selection procedure to be consistent with the rules. Besides, what was perhaps inappropriately called "Selection Committee" is not a new body but a meeting between officials representing the departments concerned, whom the Director General appoints with a view to ensuring that his decision – which is discretionary – will be an informed one.

What the Agency misnames "Selection Committee" or interview board is not a statutory body (Staff Regulations Article 9, and Article 30 as regards the Selection Board) or even an advisory body, but a meeting between officials appointed by the Director General pursuant to the first paragraph of Article 7 of Rule of Application No. 2, concerning the procedure for assignment to a post in accordance with Articles 7, 30, 31 and 45 of the Staff Regulations, according to which:

> "The Director General shall select from this list the person(s) he appoints to the vacant post(s). The selection shall be made in the light of a reasoned opinion, based on assessment interviews, provided by the unit concerned."

The sole duty of the few (in this case two) officials concerned is to assist the Director General in coming to the decision he has to take (Article 2 of the Staff Regulations) by providing him with the "reasoned opinion" of the "unit concerned". Such an opinion would appear to be essential for the appointing authority to ascertain the needs of the unit and the candidates' suitability, and thus determine where the Agency's interests lie.

The conclusion is that the selection process was consistent with the rules and that the Director General did not create a new body, which, according to the complainant, would have implied the adoption of a new rule after a consultation procedure in accordance with the Agreement of 9 January 1992.

The plea fails.

6. According to firm precedent, the executive head of an organisation has wide discretion in appointing or promoting staff. As any such decision is subject only to limited review, the Tribunal will interfere only if it was taken *ultra vires* or reveals some formal or procedural flaw or mistake of fact or law or abuse of authority, or if it overlooks essential facts or draws clearly wrong conclusions from the evidence (see for example Judgment 1771, under 6, and the others cited therein).

Here, the complainant pleads a procedural flaw.

Anyone who applies for a post to be filled by some process of selection is entitled to have his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right that every applicant must enjoy, whatever his hopes of success may be (see Judgments 1497 *in re* Flores, under 5, and 1549, *in re* Lopez-Cotarelo, under 9). An organisation must be careful to abide by the rules on selection and when the process proves flawed, the Tribunal will quash any resulting appointment, albeit on the understanding that the organisation must "shield" the successful candidate from any injury if he has accepted the post in good faith (see Judgment 1477, *in re* Nacer-Cherif, under 10).

7. The basic rules to be respected include the right of all applicants to equal treatment. The organisation may make no distinction between candidates on the basis of criteria – language, for example – which are not referred to in the entry requirements (see Judgment 1158, *in re* Vianney, under 4 *et seq*).

For the post in question the requirements were "a good knowledge of English or French and a working knowledge of the other", since the successful candidate would "ordinarily be called upon to be able to work in both these languages". The complainant rightly inferred that "French-speaking" and "English-speaking" candidates were to be put on a par in the various tests.

The right to equal treatment requires that situations which are the same or similar be governed by the same rules and that dissimilar situations be governed by rules that take account of the dissimilarity. The second requirement, which is inferred from the right to equality, can be fulfilled in a number of ways. It can be met if the relevant rule of the texts in force or the decision applying it make reasonable provision for the difference in situation. The appointing authority has considerable margin for manoeuvre in determining equivalence where situations are *de facto* unequal, and the Tribunal will not interfere unless the standard chosen exceeds that margin.

In the competition, the English-speaking and French-speaking candidates were not in the same situation, so criteria were needed that took account of the differences. The matter becomes more complex if account is taken of candidates whose mother tongue is neither English nor French. Testing all candidates in their native language would admittedly ensure equality to some extent. But that would make preparing the competition more difficult and in any case it is not the only solution. If the tests were taken at the candidate's choice in one or other of the Agency's two main working languages, there might still be the problem of how to treat candidates of another mother tongue so a "correction factor" might in any case be necessary. Since one of the requirements of the competition – and the post in question – was a good knowledge of the two main working languages, it was not unfair to provide for tests in one language only and apply an adequate correction factor to all candidates who were non-English-speaking. Such a solution redresses the balance and goes some way to ensuring equality between the candidates. Provided that it really is adequate, a correction factor does not impair the right to equal treatment.

The Agency explains that in the circumstances of the case the reasoning tests given only in English were not decisive in the recommendation not to appoint the complainant. It was the third test, relating to her character profile, which was only in French, and the interview in French and English that led the "Selection Committee" to express reservations about her candidature. According to the Agency, account was taken of the fact that three candidates were not of English mother tongue by the application of a weighting system. In fact English was not the successful candidate's native language.

The report forms drawn up by the "Selection Committee" for submission to the Director General, which are produced in the surrejoinder, confirm the Agency's assertions. They show that each test was assessed according to a variety of criteria. Those criteria were carefully chosen.

There is no evidence to suggest that the assessments, which the Director General endorsed, amount to abuse or misuse of the appointing authority's discretion.

The Agency does not claim that the weighting system applied to restore the balance for non-English-speaking candidates has the accuracy of a mathematical rule. It must be inferred that the system was applied by the experts in accordance with the circumstances – in this case to take account of the effect of a lesser knowledge of English on the results of the test. Such a criterion does not appear incompatible with equal treatment.

Nor is there any evidence to suggest that the system was applied arbitrarily.

The complainant alleges that, although she passed the reasoning tests, which were given in English, the fact that she had to take tests in English probably caused her stress. This, she says, accounts for the fact that the results of her character profile test and interview were less good. Furthermore, she had only two hours between the tests in English and the others, as opposed to several days in the case of the successful candidate, who had the added advantage of having worked in the United States, which meant that her English was better.

The Tribunal observes that there being nothing unlawful about the tests in English, the complainant may not object that they caused her difficulties.

She does not contend that her right to equal treatment was breached because she and the successful candidate took tests at different times, and on that score she is right. In competitions where tests are not scheduled for all candidates at the same time (written tests, etc.), such differences, which are hard to avoid, must be taken into account by the candidates other than in exceptional circumstances, which the complainant does not invoke.

The fact that the successful candidate's English was better than her own is immaterial to the lawfulness of the competition.

The plea fails.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-NINTH SESSION

***In re* Roulleaux** **Judgment No. 1991**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Jean Roulleaux against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 5 August 1999, Eurocontrol's reply of 3 December 1999, the complainant's rejoinder of 10 January 2000, corrected on 3 February, and the Agency's surrejoinder of 24 March 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. In 1991 the Agency adopted, with effect from 1 January 1992, Appendix IV to the General Conditions of Employment governing Servants at the Eurocontrol Maastricht Centre. This Appendix is entitled "Transitional provisions having the force of service regulations relating to the early termination of service of staff occupying a category B post on 29 April 1990 in the operations division at the Maastricht Centre". It provides that the employees concerned take early retirement at fifty-five years of age and receive a monthly allowance in place of their remuneration. The relevant part of Article 4 of Appendix IV is as follows:

> "Recipients of the [termination of service] allowance shall be entitled, in respect of themselves and persons covered by their insurance, to benefit under the sickness insurance scheme provided for in Article 72 of the General Conditions of Employment on condition that they pay the relevant contribution ... and that they cannot be covered by any other public scheme against the same risks ..."

The complainant, a citizen of Luxembourg who was born in 1943, entered the service of the Agency in Brussels in 1971 as an employee at grade C3. In 1972 he was transferred to Maastricht. He was appointed controller 2nd class at grade B4 in 1989 and subsequently controller 1st class at grade B3 in 1992.

In an internal memorandum of 22 June 1998, the Head of the Pensions and Termination of Service Section informed the complainant that he would benefit from an early termination of service allowance as from 1 August 1998. In accordance with Article 4 of Appendix IV, the complainant and his family would no longer be covered by the Agency's sickness insurance scheme because he could be covered by the Belgian public scheme. In a letter of 14 July, the complainant requested a decision by the Director General. He considered that his insurance under the latter scheme would not guarantee him the same level of coverage. By an internal memorandum of 30 July, the Head of the Pensions and Termination of Service Section informed the complainant that he and his family were entitled to coverage under the Belgian public scheme and, in a letter dated 8 October 1998, confirmed that they no longer had the right to benefit from the Agency's sickness insurance scheme.

On 9 January 1999 the complainant filed an internal complaint with the Director General against the implicit rejection of his request of 14 July 1998. He complained that the insurance scheme with which he had been obliged to register did not meet the requirements of Article 4 of Appendix IV. The case was brought to the Joint Committee for Disputes which, at its meeting on 2 August 1999, recommended that the internal complaint be upheld and an amendment made to Article 4 of Appendix IV. By a letter of 9 August, the Director of Human Resources informed the complainant, on behalf of the Director General, that his internal complaint had been rejected as having no legal merit. In the meantime, on 5 August, the complainant had filed a complaint with the Tribunal against the implied rejection of his internal complaint of 9 January 1999.

B. The complainant argues that the decision to exclude him from the Agency's sickness insurance scheme is contrary to the provisions of Article 4 of Appendix IV. Citing a letter of 18 January 1999 from a manager of an insurance company, he seeks to establish that Article 32(15) of the Belgian Law respecting "compulsory health care insurance and benefits" of 14 July 1994 does not authorise him to be covered by that insurance scheme. He was therefore obliged to take out a complementary insurance policy, costing him around 87,000 Belgian francs a year, which does not form part of a public scheme as provided in Article 4 mentioned above.

He requests the Tribunal to set aside the decision to exclude him from the Agency's sickness insurance scheme; to state that he is entitled to the benefits guaranteed by the insurance scheme under Article 72 of the General Conditions of Employment, in accordance with Article 4 of Appendix IV; and to order the Agency to pay him, as a provisional measure, 500,000 Belgian francs in material damages, 150,000 francs in moral damages and 250,000 francs in costs, to which must be added "interest on arrears and on costs".

C. In its reply the Agency submits that Article 4 of Appendix IV was correctly applied. The complainant is indeed covered by a public scheme within the meaning of that Article and of the Belgian legislation. A Royal Order of 27 April 1997 amended several provisions of the Law of 14 July 1994 and abolished "residual schemes". The persons formerly insured under these schemes are now covered by one of two existing public schemes, which cover the same contingencies as the Agency's sickness insurance scheme. Furthermore, the complainant is endeavouring to mislead the Tribunal by citing the letter of 18 January 1999, which was not addressed to him. Eurocontrol also observes that the complainant provides no proof of the amount of his contributions, nor of whether he is covered by a complementary scheme. The Agency requests the Tribunal to reject all the complainant's claims as being without merit and to order him to bear the full costs.

D. In his rejoinder the complainant contends that the Agency's employees are obliged to be insured under its own sickness insurance scheme. Under the terms of the above-mentioned Law, he cannot therefore be covered by the compulsory Belgian insurance scheme. Not being covered against the same risks by any other public scheme, he must be considered as being covered, within the meaning of Article 4 of Appendix IV, by the benefits guaranteed by the Organisation.

The decision to exclude the complainant from the Agency's sickness insurance scheme is, in his view, also arbitrary and discriminatory insofar as two of his colleagues, who also benefited from early termination of service, have remained covered by the scheme.

E. In its surrejoinder the Agency produces a letter from a mutual insurance scheme certifying that the complainant and his family are indeed registered with the public scheme under the terms of Article 32(15) of the Law of 14 July 1994.

The two colleagues to which the complainant refers benefited from early termination of service before the Royal Order of 1997 came into force. Since they had not been able to register with the insurance scheme to which, in principle, they should belong, the Agency was obliged to maintain their coverage under its own sickness insurance scheme.

CONSIDERATIONS

1. The complainant, who was born in 1943, is a citizen of Luxembourg. He joined Eurocontrol in 1971 and at the age of fifty-five was admitted as from 1 August 1998 to a transitional scheme known as "early termination of service". Pending access to his retirement pension on 1 February 2001 he gets a monthly allowance calculated according to a method set out in Appendix IV to the General Conditions of Employment. The decision of 22 June 1998 by which the Agency notified his early termination of service was accompanied by an internal memorandum informing him that he would no longer be covered by Eurocontrol's sickness insurance scheme because, as a resident of Belgium, he was eligible for coverage under the Belgian public scheme. The Agency explained that its decision was based on Article 4 of Appendix IV, which has been quoted under A above.

2. Having tried unsuccessfully to get the Organisation to revoke its decision and having joined a Belgian mutual scheme as of 1 August 1998, the complainant filed an internal complaint on 9 January 1999 against the withdrawal of the health coverage from which he had benefited ever since he joined Eurocontrol. This internal complaint was first referred to the Sickness Fund Management Committee, which declared that it was not competent, and then to the Joint Committee for Disputes, which found fault with the provisions of Article 4 of Appendix IV because, it said, these were likely to lead to discrimination between Eurocontrol staff. It recommended that the Director General allow the internal complaint and amend Article 4 of Appendix IV which had been applied. On 9 August 1999, the Director General decided not to follow the recommendation and rejected the complainant's internal complaint. A few days earlier, the complainant had come to the Tribunal seeking recognition of his rights and payment of compensation by the Agency.

3. The complainant puts forward two pleas in support of his claims. The first is that he cannot be regarded as eligible for coverage by a Belgian compulsory insurance scheme. Secondly, the decision he challenges is arbitrary and discriminatory.

4. Discussion of his first plea requires an analysis of the system of entitlement to health benefits applied in Belgium under the Law of 14 July 1994 as in force at 1 January 1998 after it had been amended by a Royal Order. According to Article 32(15) of this Law, anyone on the national register of natural persons is eligible for health benefits, but not, inter alia, "persons who are or may be entitled to health care by virtue of some other Belgian or foreign health insurance scheme". What needs to be determined therefore is whether the complainant, who does not deny being on the national register of natural persons as a resident of Belgium, is still entitled to or eligible for health care benefits under Eurocontrol's sickness insurance scheme by which he was covered while in active service. Article 4 of Appendix IV shows both symmetry and contradiction with Belgian law on this point. It establishes the principle of affiliation to Eurocontrol's sickness insurance scheme with the proviso that the persons concerned must not be eligible for coverage under another public scheme. It is understandable that,

in the light of this fundamental ambiguity, a former official of Eurocontrol in the same position as the complainant has been refused membership of the Belgian scheme on the grounds that he was eligible for the same benefits under the insurance scheme "offered by Eurocontrol". Nonetheless, in the complainant's case it has been established that he could be covered by the Belgian system – which is undeniably a "public scheme" – because he has been accepted as a member. That being so, the decision not to extend his coverage under the Agency's sickness insurance scheme conforms to the letter of Article 4 of Appendix IV, as the Joint Committee for Disputes rightly noted.

5. Is the rule at issue discriminatory and does it lead to arbitrary decisions? The complainant considers that it does and the Joint Committee for Disputes recommended allowing his appeal because if he had returned to his home country, Luxembourg, rather than staying on in Belgium, "as a former international civil servant he would have been excluded from the Luxembourg scheme and would therefore have been covered, no doubt at less cost, by Eurocontrol's sickness insurance scheme". But the fact that social protection schemes vary in scope depending on the country of residence does not in itself make the rule at issue unlawful. The Tribunal is bound to conclude that the offending decision was not arbitrary or discriminatory; and takes note that the defendant has said that, if the Belgian mutual company's refusal to admit another official heralds a change of attitude on the part of the Belgian sickness insurance managers, it will assume its obligation to provide social coverage for any officials excluded from the Belgian system.

6. Since the impugned decision is not unlawful, the complainant's various claims for compensation cannot be allowed. However, in the circumstances the Tribunal finds no reason to allow Eurocontrol's counterclaim to an award of all costs against the complainant.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. Eurocontrol's counterclaim is dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

EIGHTY-NINTH SESSION

***In re* Behl (No. 2) and others** **Judgment No. 1992**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the World Health Organization (WHO) on 31 August 1999 and corrected on 4 October 1999 by:

Madan Lal Behl (No. 2)
Bimal Kapoor
Ranjit Kathuria
Kewal Krishan Khattar
Virender Kumar Malhotra
Rajinder Singh Pahwa
S. Ragupathi
Ramachandran Rajagopalan
Raj Kumar Sabharwal
Amod Kumar Sharma (No. 2)
Man Mohan Singh
Radha Srinivasaratnam
Radha Swaminathan

Considering the WHO's single reply of 7 January 2000, the complainants' rejoinder of 7 February and the Organization's surrejoinder of 7 April 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The thirteen complainants are present or former staff members of the WHO's Regional Office for South-East Asia (SEARO) in New Delhi. At the material time they all held posts in the General Service category.

By information circular IC-95-16 issued to staff at SEARO on 15 May 1995 the Organization announced a revision of the local salary scale – Revision 37 – for General Service staff serving in New Delhi, which was to be implemented retroactively from 1 July 1994. Judgments 1838 (*in re* Grover and others) and 1839 (*in re* Battra No. 3 and others) delivered on 28 January 1999 contain further details thereon. The number of grades in the new scale was reduced from eight to seven. To reflect the results of the comprehensive survey that led to Revision 37 the new scale contained "staggered increases" in salary with each grade. Progressively higher percentage increases were granted at each grade level. These ranged from 6.3 per cent at the ND.1 level to 59.3 per cent at the ND.X level.

The complainants were all promoted between 1 July 1994 and 15 May 1995 and following promotion held grades ranging from ND.5, step 3 to ND.X, step 8. Following the implementation of Revision 37 the steps the complainants had received on promotion were recalculated to take into account the new scale and their grades then ranged from ND. 4, step 1 to ND.X, step 7.

On 21 June 1995 the complainants challenged their June pay slips which showed that in the restructuring all except one held a lower grade and they had each lost between one and six steps. After reviewing the matter the Organization informed each complainant in a memorandum of 17 February 1997 that their grades and steps had been properly established in the new scale. They appealed to the regional Board of Appeal against the way their steps had been calculated. One of its members was of the view that to "mitigate the hardship" of the complainants the matter should be completely re-examined. In a majority opinion the Board recommended that the Organization should restore to the complainants the steps they had held before the introduction of the new scale by applying a "straight conversion". The Regional Director reviewed the matter but in a decision dated 6 January 1998 he informed the complainants that he could not comply with the majority opinion of the Board.

The complainants appealed to the headquarters Board of Appeal, which recommended that they be granted "the restoration of salary steps ... as fixed before the introduction of the revised scale". The Director-General did not endorse that view and in a decision of 31 May 1999 rejected their appeal. That is the decision the complainants now impugn.

B. The complainants each object to the step they were given following the implementation of Revision 37 and say they suffered huge financial loss as their earnings and future pension benefits were affected. Because the revised scale came into force retroactively and staggered increases were introduced, they lost acquired steps and were disadvantaged in relation to colleagues who were promoted before 1 July 1994 and who retained their steps.

The complainants contend that, as was upheld by both Boards of Appeal, the WHO should have fixed their salaries in the revised scale at the same steps as they had held on promotion in the previous scale. In implementing Revision 37 other United Nations agencies in New Delhi applied a "straight conversion of steps" irrespective of the date of promotion of staff members and it would have been fair for the WHO to do the same. Citing the findings of the report of the headquarters Board of Appeal they say that such a straight conversion was carried out as a result of the comprehensive salary survey in 1990. They hold therefore that they had a legitimate expectation that the same procedure would be applied following the comprehensive survey in 1995, which is relevant to this case. They advocate applying a practice they say is recognised in "legal/administrative jurisprudence" whereby, in implementing a general rule, provision is made to "remedy hardship cases" by introducing a suitable clause in the general rule. The Organization showed bad faith as it failed to compensate their hardship either by opting for a "parallel conversion" of their steps or by making an exception to the general rule in their case.

They submit that their steps were fixed in the revised scale in breach of their acquired rights derived from Staff Rule 550.1 and 550.2.1 relating to within-grade increases. As a result of established practice they also have an acquired right to the "method of fixation of their salaries on promotion" following a retroactive revision of their grade.

The complainants seek the quashing of the impugned decision and ask that their salaries be set by "straight fixation" at the same step as they had attained on promotion before the retroactive coming into force of the revised scales. They claim damages for material and moral injury, and costs.

C. In its reply, as a preliminary observation, the WHO points out that in Judgments 1838 and 1839 the Tribunal upheld the validity of Revision 37. Although the complainants suggest that the decision to apply that revision through staggered increases has led to an anomalous situation, in Judgment 1838 the Tribunal rejected the plea that the staggered increases breached the rules, and so the matter is *res judicata*.

The Organization maintains that the reduction in steps did not breach any rules. At the time of the complainants' promotion, in accordance with Staff Rule 320.2, their net base salary was fixed at the lowest step in the new grade that provided an increase in salary at least equal to the grant of two steps in the previously held grade. In implementing the new scales the Organization took into account the salary scale in force at the time of their respective promotions (Revision 36) and calculated their new grade and step by applying Rule 320.2 to Revision 37.

It rejects the complainants' plea that they suffered loss of salary and pension benefits. On the contrary they received a higher salary following the implementation of Revision 37, even after the recalculation of their steps. They also received an increase in pay by way of a lump sum covering arrears of salary for the period from 1 July 1994 to 15 May 1995. They seem to infer that Revision 37 could determine their salaries with retroactive effect, but not the steps received on promotion. Since they benefited from the retrospective application of the new scales there was no breach of the rule against retroactivity.

The complainants were not in the same situation in fact and in law as their colleagues at SEARO who were promoted before 1 July 1994. Revision 37 was introduced by way of staggered increases, with progressively higher percentage increases being introduced per grade. The differences in increase and the corresponding steps given resulted from administrative reasons. There was no breach of the principle of equal treatment. Nor was there any breach of their acquired rights since, contrary to what they claim, they did not lose the benefit of the accrued within-grade increases provided for in Rules 550.1 and 550.2.

The Organization sees no basis for making an exception to the rules as a remedy to their situation. Action taken by other United Nations agencies to recalculate steps can be of no consequence as the WHO is bound by its own rules, and the complainants' argument on that score is without merit. It did not give them any grounds for assuming that they had a legitimate expectation that there would be no reduction in steps.

D. In their rejoinder the complainants point out that the Organization's assumption that the issue is *res judicata* is of no relevance as they are not challenging the validity of the survey leading to Revision 37.

They enlarge on their plea that the WHO should apply the method of straight conversion so that they would suffer no loss of steps. Although the Organization holds that their income increased when Revision 37 was introduced, they are still of the view that they have lost earnings and pension benefits because of its refusal to set their salaries at the previously acquired step. When promotion occurs before the retroactive coming into force of a salary scale, it has been the practice to allow a straight conversion of steps instead of applying Staff Rule 320.2. Furthermore, they argue that subsequent to the comprehensive surveys and several mini surveys carried out since 1985 staff have retained their steps even though the salary scales were implemented retroactively.

In suggesting that the Organization should follow the practice of other United Nations agencies, they were trying to propose a remedy for an anomalous situation. Since the salary scale is common to all agencies in New Delhi it is only appropriate that a uniform application of rules is ensured.

E. In its surrejoinder the Organization reiterates its arguments. It says that there has been no "practice" of straight conversion of steps in applying retrospective salary revisions. Some revisions in the past have given rise to negligible variations in grade and it has not been necessary to recalculate steps; that does not mean that a practice evolved of disregarding the correct application of Staff Rule 320.2. The complainant's argument that Rule 320.2 can be disregarded is without merit. That Rule determines the salary received on promotion and the Organization complied with its terms. The complainants received an increase in salary in the amount prescribed in the Rule both at the time of their promotion and again when Revision 37 was applied to them.

It rejects the allegation that the Organization was not in step with the United Nations common system. Instructions for proceeding to the recalculation of steps were issued by at least two other United Nations agencies in New Delhi.

CONSIDERATIONS

1. This case raises the question of the effect of a retroactive salary increase upon the within grade steps of staff members promoted between the date upon which such retroactive increase took effect and the date upon which it was announced.

2. The relevant Staff Rule of the defendant, the World Health Organization, is 320.2 and reads as follows:

> "On promotion to a higher grade the net base salary of a staff member shall be fixed at the lowest step in the new grade that will provide an increase in net base salary for promotion within the same salary scale or total net remuneration for promotion from the general service to the professional category, at least equal to that which would have resulted from the granting of two steps within the staff member's present grade. However, on restoration to a higher grade formerly held, the staff member's net base salary shall not exceed that which would have been attained had the staff member remained in the higher grade."

3. The complainants are General Service staff members and all of them received promotions between 1 July 1994 and 15 May 1995. At the time of each one's promotion, his or her new grade and step were calculated in accordance with Staff Rule 320.2 as applied to the salary scale then in force (Revision 36). That salary scale was revised on 15 May 1995 with retroactive effect to 1 July 1994. When Revision 37 was implemented the number of grades was reduced from eight to seven. "Staggered" increases were granted so that the percentage rises in the lower grades were less substantial than those in the higher grades. The Organization recalculated the grades and steps to which each of the complainants should have been promoted in accordance with the new salary scale with the result that, after the salary revision, twelve of them were at a lower grade and step than he or she had held at the time of promotion and prior to the announcement of the revised scale; one complainant moved down one step in the highest grade. Notwithstanding this fact, however, the complainants each received a salary increase as a result of the implementation of the revised scale over and above what they had already received at the time of promotion.

4. Although the complainants received some measure of satisfaction from their appeals to the regional and headquarters Boards of Appeal, the recommendations of those Boards were not accepted by the Regional Director and the Director-General respectively and the present complaints impugn the decision of the Director-General confirming the original administrative decision to recalculate the complainants' grades and steps with retroactive effect in accordance with the revised salary scale.

5. The complainants claim that they suffered financial loss as a result of the impugned decision. This is manifestly wrong. Without exception, each of the complainants received two salary increases during the period 1 July 1994 to 15 May 1995; the first, on the date when each complainant was respectively promoted and the second, upon the implementation of the new salary scale. It is true, of course, that the complainants have not received as much money as they would have liked, but that is not the same thing as saying that they have suffered a loss.

6. Next, the complainants argue that the Organization did not follow the same practice in implementing its new salary scale as that followed by other United Nations agencies in New Delhi; they say that this has caused them to lose standing with their colleagues. Apart from the fact that the complainants have not produced persuasive evidence as to the practice of other agencies (such evidence as there is, in fact, appears to be to the contrary) the practice of other agencies is irrelevant. If the Organization has acted properly and in accordance with the applicable staff rules, the fact that others who may be governed by different rules may have acted differently, is beside the point.

7. The complainants stress that they have suffered a loss of "acquired steps". This argument misapprehends the nature of a step which is simply a convenient method of determining an individual's salary entitlement. No one can acquire "a right to a step" but only to a benefit which may flow from such step. As already indicated, the complainants did not lose any benefits; on the contrary, they obtained a substantial increase in benefits in the form of increased salary as a result of the implementation of the revised salary scale. While there is no doubt a general rule against retroactivity, the complainants cannot be heard to complain of the retroactive implementation of a salary increase, the net result of which was to improve their economic situation. The fact that after the increase most of them were at a lower grade and all at a lower step than they had been prior to the increase is, in the circumstances, simply irrelevant.

8. The complainants argue that they have been treated unequally by comparison with those of their colleagues who received promotions prior to 1 July 1994. It is trite to remark that equal treatment is only due to those who are similarly situated. The complainants are not similarly situated to their colleagues who were promoted prior to 1 July 1994 since their colleagues' promotions were governed by the old salary scale whereas the complainants' promotions came in due course to be governed by the new one.

9. Finally, the complainants' argument that they should receive special treatment has no foundation in law or in equity.

10. The complaints therefore fail.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

***In re* Benze (No. 8)** **Judgment No. 1993**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr Wolfgang Eberhard Benze against the European Patent Organisation (EPO) on 4 June 1999 and corrected on 15 June, the EPO's reply of 6 September, the complainant's rejoinder of 28 September, and the Organisation's surrejoinder of 14 December 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German national born in 1938, is a permanent employee at grade A4 with the European Patent Office, the secretariat of the EPO. His duty station is Munich. He is divorced and has one daughter who lives with her mother in Bolivia. Pursuant to a German court order the complainant contributes to the maintenance of his daughter. While she was living in Germany that amount was set by the court at 860 German marks per month. He is currently waiting for a new court order to be finalised, setting his monthly contribution at 400 marks to take into account the lower cost of living in Bolivia.

According to Article 69 of the EPO Service Regulations, a dependants' allowance shall be payable to a permanent employee having a dependent child who is "mainly and continuously supported" by that official. Circular No. 82 of 19 February 1981 set out guidelines for implementing Article 69 and defined what constituted "mainly supported" with regard to a dependent child not in the custody of the permanent employee. Under those guidelines the permanent employee had to pay a minimum amount in maintenance for the child in order to qualify for the allowance. This consisted in a sum equal to the allowance, plus a "personal contribution", which was a fixed amount, determined by the employee's grade. In the complainant's case it amounted to 150 marks.

In 1996 new guidelines for determining whether a child was dependent within the meaning of Article 69 were adopted by the President of the Office and communicated to the staff in Communiqué No. 6 of 20 March 1996. They announced changes to the way the personal contribution would be calculated. In order to qualify for the dependants' allowance for one child, a permanent employee was now required to contribute an amount equal to "6% of the employee's basic salary plus the amount of the dependants' allowance, or 25% of the basic salary of grade C1/1 if this amount is lower".

In a letter of 30 May 1996 the Remuneration Department informed the complainant that he would have now to pay a total minimum contribution of 898 marks for his daughter's upkeep in order to satisfy the condition of "mainly and continuously supported". This corresponded to a personal contribution of 483.70 marks, on top of the 414.30 marks awarded as a dependants' allowance. A form attached to the letter indicated that his total contribution had been calculated as 25 per cent of the basic salary at grade C1, step 1, as this was the lower amount; the calculation on the basis of 6 per cent of his salary showed a higher amount of 1274.34 marks.

On 20 June 1996 the complainant filed an internal appeal "against the decision of the President ... making the award of a dependant's allowance for [his] daughter ... conditional on [his] paying a minimum amount of 1,274.34 [marks]". In a letter of 31 July 1996 the Director of Personnel Management informed the complainant that his minimum contribution was only 898 marks and that based on information he provided for the year 1995 his monthly payment exceeded this amount; therefore, his eligibility for the allowance would continue. On the basis of this information he asked the complainant if he wished to pursue his appeal. In its report of 25 January 1999 the Appeals Committee unanimously recommended that the appeal be dismissed as unfounded. It also recommended that the decision on the "necessary minimum financial support" payable by the complainant be reviewed.

Since the time the complainant first filed his internal appeal an adjustment was made on 1 July 1998 to both salary and the dependants' allowance, increasing to 940.53 marks the total monthly amount he had to contribute in maintenance. On 6 April 1999 the Principal Director of Personnel informed him that, based on the unanimous recommendation of the Appeals Committee, the President had rejected his appeal. That is the impugned decision.

B. The complainant contends that the requirement that an official must contribute to his dependant's maintenance an amount far in excess of the allowance received from the Office, is not supported by the Service Regulations, and would never be approved by the Administrative Council, and does not take into account any obligations established by a national court order. He argues that the President of the Office issued Circular No. 82 and Communiqué No. 6 without authority and that these were directed at limiting the applicability of Article 69. The Service Regulations only require that the child be "mainly and continuously" supported by the staff member, but the effect of the guidelines has been to redefine Article 69 with the result that the sum he pays in maintenance is in excess of the statutory requirements of supporting his child "mainly and continuously". It also exceeds the amount specified by the national courts.

The complainant submits that not only has his appeal been rejected, but the letter informing him of the rejection referred to further stipulations governing the receipt of the dependants' allowance: payments must be made to the mother up until his child reaches the age of 18 and he must present receipts to this effect signed by his former wife. He particularly contests this stipulation as he is concerned about a risk that not all of the money will go to his child.

He seeks: (1) the quashing of the decision of 6 April 1999; (2) a ruling that the EPO be required to recognise "national family court decisions" and to accept that "full support" as defined by a national court meets the requirement under Article 69 of supporting "continuously" and "mainly"; and (3) a ruling that the EPO be obliged to apply the Service Regulations "verbatim" and submit to the Administrative Council's competence for any amendments.

C. In its reply the Organisation argues that the complaint is irreceivable. The complainant is entitled to and receives the dependants' allowance. Furthermore, he voluntarily pays a higher amount than what is required by the Service Regulations. He is not adversely affected by the 1996 guidelines and therefore his complaint is only of an academic nature.

Subsidiarily, it contends that setting a precondition for entitlement to an allowance is not a breach of the Service Regulations, and that the amount of the contribution required is justified. Since the Service Regulations themselves do not define the concept of "mainly and continuously supported" it is up to the President, and within his discretionary power, to lay down the exact meaning of those terms. It is particularly important to have the concept defined in a case where the child is not resident with the permanent employee. Article 10(2)(a) of the European Patent Convention empowers the President to adopt internal administrative instructions.

An increase in the amount of personal contribution was warranted and two objective methods of calculation were adopted. The EPO stresses that it is the lower of the two resulting amounts that the employee must pay. The new guidelines were the result of a thorough discussion with the General Advisory Committee. The complainant did not protest when the 1981 guidelines required a personal contribution of 150 marks, therefore it appears that he does not object to the idea that a permanent employee should be required to contribute a sum larger than the dependants' allowance; what he is contesting is its amount.

It objects to the complainant's request for oral hearings since he has failed to show that anything can be gained by such hearings.

D. In his rejoinder the complainant contests the EPO's argument that the complaint is irreceivable. Rejection of his complaint would allow the President to "escalate" the amount of the personal contribution without furnishing objective grounds under the Service Regulations. Notwithstanding the fact that his contributions exceed the arbitrary amount set by the Office, such high levels of contributions set by the Office are tantamount to duress, particularly when it can be shown that they are not fundamentally warranted. He presses his plea for oral proceedings, or subsidiarily, he applies for leave to enter further written submissions so that he may answer any allegations made by the defendant.

E. In its surrejoinder the Organisation presses its arguments that the President acted within his discretionary authority when he adopted the implementing guidelines for Article 69 and denies that he is bound by either national laws or court decisions; he is only required to apply the Service Regulations equally to all employees. It reiterates its previous objection to oral proceedings, and objects to the complainant's request for further submissions.

CONSIDERATIONS

1. The complainant pays maintenance for his child from a previous marriage who lives with her mother in La Paz, Bolivia.

2. Under Article 69(1) of the Service Regulations he is entitled to a dependants' allowance for his child under the conditions laid down in Article 69(3) a), which specifies that for the purpose of the Regulations a dependent child shall be:

> "the legitimate, natural or adopted child of a permanent employee, or of his spouse, who is mainly and continuously supported by the permanent employee or his spouse."

3. Guidelines for implementing Article 69(3) were enacted by the President of the European Patent Office and issued in Circular No. 82 dated 19 February 1981. These provided that any child not resident with the permanent employee would be considered as being "mainly supported" by

the employee if the employee was paying by way of maintenance an amount which exceeded the dependants' allowance paid by the Office by a personal contribution (for grade A3 and higher) of 150 German marks.

4. New guidelines replacing Circular No. 82 were enacted with effect from 1 April 1996 and notified in Communiqué No. 6 dated 20 March 1996. One alteration concerned the amount of financial support which a staff member had to provide for a child not in his custody in order to have the child recognised as being "mainly and continuously supported" by him. The new guidelines provided that the financial support provided had to equal: for one child, "6% of the employee's basic salary plus the amount of the dependants' allowance, or 25% of the basic salary of grade C1/1 if this amount is lower".

5. After the coming into operation of the new guidelines the minimum monthly contribution which the complainant had to pay towards his child's maintenance in order to qualify for payment of the dependants' allowance was 898 marks, being 25 per cent of the basic salary at grade C1, step 1. The complainant mistakenly understood the notice to mean he had to contribute 1,274.34 marks and lodged an internal appeal on 20 June 1996 against the decision to make his receipt of the dependants' allowance conditional on his paying that amount, and contesting the provisions of the new guidelines.

6. The Director of Personnel Management informed the complainant on 31 July 1996 of the precise amount of his personal contribution and noted that, since the financial support provided by him exceeded the minimum monthly amount, he would continue to receive the dependants' allowance. The complainant pursued his internal appeal requesting that the new provisions should be withdrawn or that they should not be applied in his case.

7. The Appeals Committee recommended: (1) dismissing as unfounded the complainant's contention that the new provision concerning the minimum financial support payable under Communiqué No. 6 was

unlawful; and (2) reviewing the decision on the necessary minimum financial support payable by him.

8. By a letter dated 6 April 1999 the Principal Director of Personnel told the complainant that the President had decided to reject his appeal in accordance with the unanimous opinion of the Appeals Committee. He told the complainant that in a case where the criteria set out in the Communiqué were not fulfilled it was still possible to examine a case by direct reference to Article 69, and he asked him to furnish further particulars as set out in the letter. That is the decision impugned.

9. The complainant asks the Tribunal: (1) to quash the decision of 6 April 1999; (2) to rule that the European Patent Office has to "recognise national family court decisions" and in particular "accept that 'full support' defined by a national court [meets] the requirement in Article 69 of supporting 'continuously and mainly'"; and (3) to rule that the EPO must apply the Service Regulations "verbatim" and to "submit to the Administrative Council's competence" for amending the Regulations.

10. On 4 June 1999, the date on which this complaint was lodged, the minimum monthly contribution which the complainant was required to pay in order to qualify for the dependants' allowance was 940.53 marks. In fact in 1998 the complainant paid a monthly sum of 1,565.54 marks which is higher than the minimum monthly contribution required to qualify for the allowance.

11. The Organisation claims that the complaint is irreceivable because the complainant is not adversely affected by the impugned decision and the complaint is of a purely academic nature. It also claims that the matter at issue in his third claim for relief did not form part of the internal appeal.

12. The complainant argues that the payments he made are partly compulsory (under a German court order), partly conditional (based on an assumption of the cost of schooling), partly voluntary (providing for restaurant visits), and partly provisional (through the establishment of a

sinking fund set up as the current court order is not final and further retroactive payments may be necessary).

13. In the opinion of the Tribunal the designation of different descriptions to different parts of the payment made by the complainant are irrelevant. The sum which the complainant pays in total exceeds the sum of the minimum contribution set out in the guidelines. The complainant has not shown that he is adversely affected by the Communique. He continues to be entitled to the dependants' allowance and therefore shows no cause of action. His third claim for relief did not form part of the internal appeal. That aspect of his complaint is therefore irreceivable and must fail (see Judgment 1520, *in re* López Lahesa and others, under 7).

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

***In re* Hébert** **Judgment No. 1994**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Waltraud Hébert against the European Patent Organisation (EPO) on 30 June 1999 and corrected on 12 July, the EPO's reply of 17 September, the complainant's rejoinder of 22 November, and the Organisation's surrejoinder of 14 December 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German national born in 1960, is a permanent employee at grade B3 with the European Patent Office, the secretariat of the EPO. Her duty station is Munich. Pursuant to a French court order her husband had to contribute to the maintenance of his two children by a previous marriage who lived with their mother in France.

Article 69(1) of the EPO Service Regulations provides that a dependants' allowance shall be payable to a permanent employee for a dependent child who under the terms of Article 69(3) is "mainly and continuously supported by the permanent employee or his spouse". Circular No. 82 of 19 February 1981 set out the guidelines for implementing Article 69 and defined what constituted "mainly supported" for dependent children not in the custody of the permanent employee or his/her spouse. Under those guidelines the permanent employee had to pay a minimum amount in maintenance for the child in order to qualify for the allowance. This consisted in a sum equal to the allowance, plus a "personal contribution", which was a fixed amount determined by the employee's grade. In the complainant's case it amounted to 50 German marks per child, making a total of 100 marks.

In 1996 new guidelines for determining whether a child was dependent within the meaning of Article 69 were adopted by the President of the Office and communicated to the staff in Communique No. 6 of 20 March 1996. They announced changes to the way the personal contribution would be calculated. In order to qualify for the dependants' allowance for two children, a permanent employee was now required to contribute an amount equal to "9% of the employee's basic salary plus twice the amount of the dependants' allowance, or 45% of the basic salary of grade C1/1 if this amount is lower".

On 25 April 1996 the complainant addressed a petition to the President of the Office, objecting to the increase of the personal contribution she would have to make in order to receive the dependants' allowance. The President replied on 30 May informing her of the reasons for the increase and granting her an extra month in which to regularise the amount of her payments.

In a letter of 12 June 1996 the Remuneration Department informed the complainant that she would have to pay a total contribution of 1,394.70 marks for her husband's children in order to satisfy the condition of them being "mainly and continuously supported". This corresponded to a personal contribution of 566.10 marks, on top of the 828.60 marks awarded as a dependants' allowance. Her total contribution was calculated as 9% of her basic salary plus twice the amount of the dependants' allowance. Since she was paying less than the sum required, her dependants' allowance was to be discontinued as of July 1996 on the grounds that the monthly maintenance paid for her husband's two children was below the minimum amount payable to qualify for the allowance.

On 20 June 1996 the complainant filed an internal appeal against the application of the new provisions in Communiqué No. 6 which set out new guidelines governing the grant of the dependants' allowance. In its report of 25 January 1999 the Appeals Committee recommended unanimously that her appeal, requesting that the provisions concerning the minimum financial support be ruled unlawful, should be dismissed as unfounded. With regard to her request for retroactive payment of the dependants' allowance the Committee recommended that her individual case be reviewed. On 6 April 1999 the Principal Director of Personnel informed her that, based on the unanimous recommendation of the Appeals Committee, the President had rejected her appeal. That is the impugned decision.

B. The complainant claims that she is entitled to a dependants' allowance. She states that she continued to pay the full amount of the monthly maintenance required by court order. She paid for both children until November 1997 and for the younger one until December 1998; and her contribution for each child was "considerably higher" than the respective amounts of the dependants' allowance provided for in Article 69. She argues that "mainly and continuously supported by the permanent employee or his spouse" means that a regular contribution of more than 50 per cent of the costs of bringing up the child is being met by the employee. This cost is going to vary in each individual case, due to factors such as age, lifestyle, education, place of residence and it is not dependent on the salary of the employee.

The President of the Office issued Communiqué No. 6 without authority as he has no power to adopt implementing regulations that exclude from receiving the dependants' allowance employees whose contributions nevertheless cover more than 50 per cent of the costs of bringing up the child. The complainant contends that any employee that fulfills that obligation should be entitled to the allowance, as long as the total amount paid for the dependent child is higher than the amount of the allowance; she agrees that the employee should not be able to benefit financially through having a dependent child.

In addition, the practical application of the EPO's requirement will trigger new disputes for some employees who, as in her case, try to pay maintenance at a higher rate than that stipulated on the court order.

She asks the Tribunal to: establish that "the decision of the President ... to require the minimum amounts set out in Rule 1(2) of his Communiqué [No.] 6 was taken in breach of Article 69(3) of the Service Regulations and is therefore null and void; [and that] the condition 'mainly and continuously supported by the permanent employee or his spouse' in Article 69(3) ... is fulfilled, as long as the person to whom the Service Regulations apply pays for his dependent child the amounts he is obliged to as sole contributor by national law or court decree, on condition that said amount is at least equal to the amount of the dependants' allowance under Article 69". She also wants the Tribunal to order that the defendant will pay the complainant the amount of the dependants' allowance "for one child from July 1996 to November 1997 (inclusive) and for the second child from July 1996 to December 1998 (inclusive)"; and asks for an award of 2,500 marks in costs.

C. In its reply the Organisation argues that setting a precondition for entitlement to an allowance is not a breach of the Service Regulations, and that the amount of the required personal contribution is justified. Since the Service Regulations themselves do not define "mainly and continuously supported" it is up to the President, and within his discretionary power, to give an exact meaning, something that is particularly important when the child is not resident with the permanent employee.

In making maintenance payments the complainant has to pay the personal contribution and the Organisation contributes twice the sum of the dependants' allowance. Its contribution comes by way of the independently adopted Service Regulations; therefore, it can be set irrespective of national laws or court decisions. The President has correctly used his discretionary power in the adoption of the 1996 guidelines. It also points out that the President offered to review the complainant's case upon presentation of supporting documents.

D. In her rejoinder the complainant reiterates her argument that the criterion "mainly and continuously supported" should be objective and based on the needs of the dependent child and not on the Organisation's salary scheme. When a court order imposes an obligation to bear the costs of maintenance, and this obligation is met, the requirements of Article 69(3) should be deemed fulfilled.

She argues that the legislators could not have intended to allow the President to set the level of maintenance which constitutes "mainly and continuously supported" in a way that excludes employees from receiving the allowance even though they have satisfied a court order; in fact, as it now stands, the President could continue to raise this level thereby excluding even more employees. She says she is not contending that the President and the Administration in assessing whether the requirement of Article 69(3) is met were "directly bound [by] a national court order", but rather that they are bound by the Service Regulations and must apply objective criteria; in her view proof of carrying out a court order is such an objective criterion.

E. In its surrejoinder the Organisation presses its argument that the phrase "mainly supported" required defining and that this was within the President's discretionary authority. Furthermore, according to the Tribunal's case law, the Organisation is free to amend the conditions for granting allowances as long as it does not do away with the allowance itself. In addition, international organisations are not required to apply national laws or court orders in their dealings with staff.

CONSIDERATIONS

1. The complainant paid maintenance for her husband's two children by a former marriage who lived with their mother in France. She paid for the older child until November 1997 and for the younger one until December 1998.

2. The complainant was entitled to claim a dependants' allowance for both children under the conditions laid down in Article 69(3) a) of the Service Regulations. This provides that for the purposes of the Regulations a dependent child shall be:

> "the legitimate, natural or adopted child of a permanent employee, or of his spouse, who is mainly and continuously supported by the permanent employee or his spouse."

3. There is no definition in the Article of the meaning of "mainly and continuously supported by the permanent employee". By Communiqué No. 6 dated 20 March 1996 all the staff were informed of new guidelines, drawn up by the President of the Office, for determining whether a child is dependent within the meaning of Article 69(3) a) and c). One of the changes concerned the amount of financial support a staff member had to provide for a child not in the custody of the staff member or his spouse in order to have the child recognised as being "mainly and continuously supported" by the staff member. The new guidelines – insofar as they were relevant to the complainant – provided that where a child is in the custody of a person other than the employee or spouse and is not resident with them "the child shall be assumed to be 'mainly and continuously supported' by the employee or spouse" if the financial support provided by either of them equals at least the following amounts:

> "for two children 9% of the employee's basic salary plus twice the amount of the dependants' allowance."

4. Prior to the introduction of those guidelines the relevant criteria, set out in Circular 82 dated 19 February 1981 required that, in order to qualify for the dependants' allowance the permanent employee had to pay a minimum amount in maintenance which included a personal contribution of a fixed amount in German marks, payable over and above the dependant's allowance. In the case of the complainant the fixed amount which exceeded the allowance was 50 marks for each dependant, the rate applicable to grades C to B4.

5. The amount of financial support that the complainant had to pay after the coming into force of the 1996 guidelines was twice the amount of the dependants' allowance, totalling 828.60 marks (414.30 marks multiplied by 2) plus 566.10 marks – representing 9 per cent of her basic salary. The complainant was so informed by a letter dated 12 June 1996.

6. The complainant filed an internal appeal against the new provision set out in Communique No. 6 in June 1996. In the course of the internal appeal the Organisation said the guidelines do not limit the entitlement to the dependants' allowance. It also said the Office would review individual cases retrospectively (in accordance with Judgment 743, *in re* Flick) to see if payment of a dependants' allowance was justified even though the minimum level of support fixed in the guidelines was not being paid in full.

7. The Appeals Committee concluded that her claim, that the provision concerning financial support be ruled unlawful, should be dismissed but recommended that with regard to retroactive payment the complainant's case be reviewed.

8. By a letter dated 6 April 1999 the Principal Director of Personnel informed the complainant of the President's decision to reject her appeal in accordance with the unanimous recommendation of the Committee. He added that this would not preclude a review of her case and he indicated what further information was required from her. That is the decision impugned.

9. The complainant claims retrospective payment of the dependants' allowance for the period from July 1996 to November 1997 for one child and from July 1996 to December 1998 for the second child plus a sum for costs.

10. According to the complainant the court order placed the financial burden of providing for the children's maintenance solely on her husband. It referred to the "contribution to maintenance" to be paid by him. The complainant submits that the wording of the phrase "mainly and continuously supported" in Article 69 indicates that the relevant criterion is whether the employee contributes more than 50 per cent of the costs of bringing up the child. It is an objective test. Costs vary in each case. In her view it follows that the President has no power to adopt an implementing regulation under which employees who pay less than the minimum fixed in the regulation are excluded from receiving the dependants' allowance. If the employee fulfils a legal obligation to bear alone the costs of bringing up the

child as fixed by law or court order, he is entitled to the dependant's allowance as long as the amount he is legally obliged to pay equals or exceeds the allowance. If the implementing regulation results in maintenance payments over the legally set amount, this could mean that new disputes would be triggered between the divorced parties. Even if the minimum amounts payable under the guidelines did not apply in all cases, the employees would still be at the mercy of the Organisation as to what criteria would be applied and what evidence would be sufficient. There would be no legal certainty.

11. The Organisation argues that the method of calculating the personal contribution due for each child based on a proportion of the employee's basic salary and the number of dependent children, is justified by the principle that the employee must support the child having regard to his personal resources and provide each child with the same standard of living. The *raison d'être* of the dependants' allowance system is to improve the situation of the child. It claims it is up to the Office to lay down and apply its own conditions irrespective of national laws and decisions taken by national courts. The President of the Office is under no obligation to take account of a child's rights to maintenance under national law or by court order when he sets the general condition on which entitlement to a dependants' allowance depends. Such rights, being defined according to different criteria in each country, do not necessarily correspond to main support. Taking them into account would be tantamount to an inconsistent application of Article 69 which sets out the terms of the dependants' allowance. Any problems arising between the complainant and the mother of the children are of no relevance in this case. The court order dated 26 July 1983 refered to "the contribution to maintenance" fixed for the complainant's husband: it did not say that the entire financial burden for the maintenance of the two children was to be borne by him.

12. The contribution to maintenance set by the national courts varies from country to country. Contrary to what the complainant contends the Organisation is not limited to the amounts fixed by any court order when interpreting the meaning of "mainly and continuously supported". The President can lay down the criteria for what is meant by "mainly supported".

There is nothing to suggest that the amount of the personal contribution is excessive. In any event, the new guidelines do not have the effect of doing away with the allowance, since the Organisation accepted the possibility of reviewing the personal contribution in individual cases, if circumstances so required. Therefore, the claim fails.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

In re **Allaert (No. 2) and**
Warmels (No. 5)

(Application for execution)

Judgment No. 1995

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr Eric Jaak Allaert and Mr Rein Herm Warmels on 2 August 1999 for the execution of Judgment 1821;

Considering the interlocutory order in Judgment 1908 delivered on 3 February 2000 as well as the submissions by the complainants and the European Southern Observatory (ESO) that are cited in the first paragraph of the preamble to that order;

Considering the further submissions filed, in accordance with the decision in Judgment 1908, by the Observatory on 16 March 2000; the observations on those submissions submitted by the complainants on 6 April and the ESO's comments on those observations of 28 April 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 1821 (*in re* Allaert and Warmels No. 3) delivered on 28 January 1999 the Tribunal ordered the ESO to recalculate the adjustment of the remuneration of its staff as from 1 January 1996. The complainants challenged the ESO's implementation of that order in an application for

execution. In its reply to their application the Observatory relied on a decision taken on 23 September 1999 by the ESO Council to maintain the rate of adjustment for 1996 at 0.7 per cent. From the parties' observations, the Tribunal concluded that serious doubt existed as to the process whereby the "decision" in question was drafted, put to a vote and adopted. It accordingly decided in its interlocutory judgment, Judgment 1908 (*in re* Allaert No. 2 and Warmels No. 5), delivered on 3 February 2000 to defer ruling on the merits of the case and ordered the Observatory to submit:

> "a brief giving an account of the circumstances in which the decision bearing the date 23 September 1999 was adopted and approved, and providing all relevant information on the procedure whereby the matter was put to the members of the Council, the procedure for the consideration of the amendments and the basis in law for the written procedure whereby the decision was taken."

2. From the explanations given by the ESO, the Tribunal concludes that the decision of 23 September 1999 was adopted properly. It nonetheless observes that, in view of the importance of the matter and the fact that the Tribunal quashed the decisions on pay adjustment taken in 1996, it is regrettable that the Observatory did not apply a more transparent procedure allowing thorough discussion of the issues raised by the execution of Judgment 1821.

3. In any event, Rule 8 of the Rules of Procedure for the ESO Council says:

> "1. The Director General, with the agreement of the Chairperson, may submit matters to the Council for decision in the written procedure, if he considers that the matter is so urgent that it cannot be postponed to the next ordinary meeting of the Council but does, on the other hand, not justify an extraordinary meeting.
>
> 3. Decisions on matters submitted in the written procedure shall be subject to the same voting majorities as required by the Convention."

4. That was the procedure the ESO applied. Since the deadline for its reply to the application for execution was set at 15 October 1999, the Observatory deemed that a decision by the Council was urgent. The next ordinary meeting of the Council being scheduled for December 1999, it opted for the written procedure. The Tribunal cannot allow the complainants'

plea that a written procedure would have been unnecessary if the Council had dealt with the matter at its meeting in June 1999. Although the situation was of the Observatory's own making, it may be taken as established that the matter was urgent.

5. The evidence submitted by the ESO shows that the head of Administration, acting on the Director General's behalf, informed the members of the Council on 10 September 1999 of a proposal to maintain the 0.7 per cent adjustment rate on the basis of criteria outlined in the ESO's draft reply to the Tribunal which pertained to the budgetary situation, maintenance of competitive levels of salary and maintenance of purchasing power. The members of the Council were asked to take a decision by written procedure on the understanding that it might be reviewed in the light of the talks with the staff. There is no evidence to suggest that the procedure was initiated without the Chairperson's agreement. Replies were sent in by Germany on 14 September, Sweden and the Netherlands on 15 September, Switzerland on 20 September, Belgium on 23 September. Replies were given by telephone by Denmark on 15 September and by Italy on 17 September which sent written confirmation on 28 September. France was the only member not to participate in the vote. According to the ESO, and there is no reason to doubt its assertion, all the delegations were in favour of the Administration's draft proposal though some asked for "minor amendments essentially to the presentation of the draft".

The Tribunal is satisfied on the evidence that at 23 September a majority had endorsed the Administration's position by means of a procedure which was not in itself unlawful. Though probably not yet set out in the form it was given on 25 October 1999 with the number ESO/Cou-709 conf., the decision was indeed taken on 23 September 1999, with the reasons, which had been sent to all members of the Council.

6. What the Tribunal needs to determine therefore is whether, in the light of the reasons given for it, the decision constitutes proper execution of Judgment 1821, as defined in Judgment 1908.

7. The ESO's justification for not applying the Coordinated Organizations' adjustment rate – set at 1.3 per cent for 1996 – is as follows. The Council could properly depart from the orientation given by that index if it took account of relevant criteria. The factors the Council considered were first, the budgetary situation of the Observatory, which had to resort to borrowing money in order to finance ambitious scientific projects, and that of member States, which were subject to severe restraints. It concluded that a lower rate than that of the Coordinated Organizations was warranted. Secondly, it considered a review prepared for the European Organization for Nuclear Research (CERN) in 1995 comparing salaries in a number of research organisations and institutions which showed that

> "the ESO salaries were on the average 7% above ... CERN and 8% above [the European Molecular Biology Laboratory (EMBL)] and substantially above those paid by national institutions ... 28% above the German DESY."

The Council therefore decided to take into account "the need to align the ESO salaries and allowances with those of CERN and EMBL". Lastly, wishing to maintain competitive levels of salary, the Council noted that the net average salary of the ESO staff in 1996 was above that of German industry and that the adjustment granted in 1996 kept the compound index of the ESO salaries above the salary indices of German public research institutions and the national consumer price index in Germany. The Council also wanted to narrow the gap between the evolution of inflation in the Observatory's host State and the evolution of the ESO salaries. That could have led to an adjustment of less than 0.7 per cent, which would have sufficed to maintain the staff's purchasing power. The Council's conclusion was that "an overall appreciation of the above criteria warranted for 1996 the decision to apply the [Coordinated Organizations'] index in part only".

8. The Tribunal appreciates the Observatory's endeavour to set criteria which are as objective as possible for determining the index for adjustment of the ESO salaries. It is nonetheless bound to note that the reasons put forward by the ESO have served to justify maintaining the rate of 0.7 per cent, which the Tribunal censured, without giving staff any guarantee that the methodology used produces results which are stable, foreseeable and clearly understood, as Judgment 1821 required. It is clear from the criteria that the ESO considered in deciding to depart from the

index of the Coordinated Organizations which is to be used as an "orientation" in accordance with Article R IV 1.01 of the Staff Regulations, that it sought, in particular, to align its pay with that of CERN and the EMBL, and to reduce the gap between the above remuneration and the national consumer price index in Germany. The first of those criteria is unrelated to "the economic, budgetary and social situation prevailing in the Organization and in the member states" and appears to imply that the "orientation" taken by the Observatory is the pay adjustment index applied by other organisations – similar admittedly to the ESO – rather than the Coordinated Organizations' index. As to the second criterion, it can, as the complainants rightly point out, lead to the evolution of inflation in the host country being taken as the main basis for adjustment.

9. The Council's hastily adopted decision reflects the uncertainty created by a lack of any consistent methodology and of which the ESO itself is aware: in his letter of 10 September 1999 to the members of the Council, the head of Administration said that the decision he was submitting to them might have to be reviewed in the light of the results of talks with staff. It is worth noting in this connection that the salary reviews produced to show that the ESO pay was higher than that of some institutions and comparable sectors of German industry prompted objections on the part of the complainants, and that these objections, some of which are substantial, have elicited no reply from the defendant.

10. In these circumstances, the Tribunal is bound to conclude that the Observatory has failed to show that it took adequate steps to ensure full implementation of Judgment 1821, which ordered it to recalculate the adjustment of salary for staff in accordance with Article R IV 1.01 of the Staff Regulations, using a methodology that would lead to results which were stable, foreseeable and clearly understood. The complainants' claim concerning payment of a penalty in default is disallowed, but the Tribunal will send the cases back to the Observatory for it to review their entitlement to an adjustment of pay for 1996.

11. The complainants are entitled to an award of costs, which the Tribunal sets at 30,000 French francs.

DECISION

For the above reasons,

1. The Tribunal declares that the decisions taken by the ESO following Judgment 1821 do not constitute proper execution of that judgment.
2. The cases are sent back to the Observatory for it to recalculate the salary adjustment to which the complainants are entitled for 1996.
3. The ESO shall pay the complainants a total of 30,000 French francs in costs.

DISSENTING OPINION BY JUSTICE CARROLL

1. I regret that I cannot agree with the judgment of my colleagues in this matter in relation to whether the decision taken on 23 September 1999 by the ESO Council constituted a valid execution of Judgment 1821 (*in re* Allaert and Warmels No. 3).

2. Following Judgment 1419 (*in re* Meylan and others), the ESO changed Article R IV 1.01 of the Staff Regulations – with effect as from 1 January 1996 – so that the Council was to use, "as an orientation", an index corresponding to the salary adjustments of the Coordinated Organizations, provided that, in assessing whether and to what extent the index should be applied, the Council should take into account relevant criteria including the economic, budgetary and social situations prevailing in the Observatory and in the member States.

3. On 10 and 11 June 1996, the Council agreed to a 0.7 per cent adjustment in pay as from 1 January 1996. That decision was set aside in Judgment 1821 on the basis that the ESO failed to establish any

methodology or comply with its own Article R IV 1.01 of its Staff Regulations – the Observatory having failed to show any orientation towards the index or any evidence of taking account of relevant criteria. The matter was returned to the ESO to recalculate the adjustment of salary in accordance with Article R IV 1.01 and in the light of the judgment.

4. In August 1999 an application for execution of Judgment 1821 was made to the Tribunal. A decision was taken by the ESO Council on 23 September 1999 fixing a 0.7 per cent adjustment in pay as from 1 January 1996. An interlocutory order was made in Judgment 1908 (*in re* Allaert No. 2 and Warmels No. 5) concerning whether the decision-making process had been validly complied with. It is accepted by the Tribunal in the present judgment under 1 to 5 that a decision was in fact made on 23 September 1999. I do not dissent from this finding.

5. The ESO, having previously failed to establish any basis on which it could do nothing but follow the Coordinated Organizations index (see Judgment 1821), has now clearly explained the basis on which the Council's decision of 23 September 1999 was reached. The Council considered: the budgetary situation of both the Observatory and the member States, which was and continued to be critical; and the budgetary appropriation of the member States for all international organisations active in science, research and development, the proper allocation of which required, inter alia, that the staff of comparable organisations such as CERN, the EMBL and the ESO be, in principle, treated equally in regard to salary. It considered a salary study revealing that the ESO salaries were on the average 7 per cent higher than those paid by CERN and 8 per cent above those of the EMBL and substantially above those paid by national institutions. It took note that only the European Space Agency and the Joint Research Centre of the European Union offered higher salaries but it held that those organisations were in principle in a different position. The Council therefore decided not to follow the index of the Coordinated Organizations without reflection but to take into account in a decision of its own, the need to align the ESO salaries and allowances with those of CERN and the EMBL. It intends to keep the ESO salaries and allowances at an adequate level in order to motivate staff and

ensure the Observatory's competitiveness with regard to comparable employment in industry. The index of the Coordinated Organizations does not take into account the specific situation of scientific personnel employed in the public service or in industry. A review showed that the net average salary of the ESO staff in 1996 was above that of German industry. The adjustment granted for 1996 kept the ESO salary compound index over those paid by the German public sector. It decided that the purchasing power of the ESO salaries should be maintained as a minimum requirement for social reasons. The Council, in considering relevant data, found that the ESO salaries have developed over the years so as to result in substantially higher increases than the national consumer price index for Germany. It is endeavouring to reduce the resulting gap between inflation in the host state and the development of the ESO salaries. It intends to re-establish a more realistic basis for future adjustments. The salary adjustment for 1996 kept the index of the Observatory's salaries in that year above the German national consumer price index and the purchasing power of staff pay was therefore secured. The purchasing power of the remuneration could have been kept with a lower adjustment than 0.7 per cent but for social reasons, the increase of the contribution of the personnel to the CERN Pension Fund in 1996 was also to be taken into consideration by the Council.

6. In my opinion, the Observatory has fully complied with the principles set out under 7 of Judgment 1821. While the ESO still has a standard of reference, namely, the index of the Coordinated Organizations, it no longer blindly applies it and the Staff Regulations have been altered to allow a departure while taking certain criteria into account. It is explained how these criteria were applied and the Observatory's intentions into the future. The ESO staff can look forward to salary increases in which the index of the Coordinated Organizations will be considered as also the salary levels of the EMBL and CERN. They can expect salaries to come more into line with those of the aforementioned two international organisations. The consumer price index in Germany will be taken into account so as to consider the purchasing power of the ESO salaries; and comparable employment in industry and in the public sector in Germany will also be looked at so as to ensure that salaries remain competitive. Such a

methodology for determining salary adjustments is certainly easily understood. It is foreseeable in that the future is mapped out and it is stable in that salaries will keep pace with the cost of living while the budgetary situation of the organisation is kept on a sound footing. The discretion to depart from the index of the Coordinated Organizations has been clearly explained so that it cannot be said that the Observatory has failed to give proper reasons.

7. Another international organisation, the EMBL, adopted a new Article R 4 1.01 of its Staff Regulations very similar to Article R IV 1.01 of the ESO. The salary adjustment for 1996 and 1997 that the EMBL had made under the new article came under scrutiny in Judgments 1912 (*in re* Berthet No. 2 and others) and in 1913 (*in re* Dauvergne and others). In both cases, the EMBL departed from the index of the Coordinated Organizations. In both cases, the Tribunal dismissed the complaints as being without merit.

8. In Judgment 1912, the Tribunal held that the complainants had not demonstrated how the evaluation of the budgetary situation of the Organisation and the member States had been based on wrong factors. The complainants had given no indication that the salary adjustments in question had the effect of keeping their salary at a level that would be manifestly inadequate. There was no acquired right to have their salaries index linked.

9. In Judgment 1913, a challenge to the system adopted under the new Article R 4 1.01 on the grounds that it left the door open for arbitrariness, was dealt with in full under 14 of that judgment.

10. I can distinguish no difference in principle between the issues arising in Judgments 1912 and 1913 and the issues in this case.

11. With regard to particular reasons given in this judgment of the Tribunal, I have the following comments:

(a) The figure of 0.7 per cent was not in itself condemned in Judgment 1821. What was condemned was a failure to explain how it was arrived at. In my opinion, there can be no criticism directed to the finding of the same percentage which is now explained.

(b) Concerning the reference to the "alignment" of the remuneration of the ESO with salaries of CERN and the EMBL, there is nothing in Article R IV 1.01 of the Staff Regulations which would prevent the Council from referring to indices for salaries in CERN and the EMBL as well as considering the index of the Coordinated Organizations. It is not true, in my opinion, to say that the "alignment" of the ESO salaries with those in CERN and the EMBL does not concern the budgetary, economic and social situation in the Observatory and the member States. On the contrary, the member States, for example, are very aware of the relationship between the three organisations and the necessity to treat them equally.

(c) In view of the fact that the ESO specifically rejects the allegation that it wishes to limit the increase in salaries in the future to the increase in the German consumer price index, I cannot see how the Tribunal is justified in saying that the consumer price index could lead to becoming the principal criterion for adjustment.

(d) The letter of 10 September 1999 from the head of Administration to the Council members – which predated the Council decision – saying that the decision presented to them was subject to a possible revision in the light of the outcome of the talks with staff members, should not be interpreted by the Tribunal as uncertainty about the methodology. Efforts to reach a settlement are to be encouraged and a willingness to talk and negotiate should not be viewed as a sign of weakness or "uncertainty". The fact that no agreement was reached and that the Council had to make an executive decision is immaterial. The validity of the Council decision depends on objective criteria and has nothing to do with the willingness of the Observatory to negotiate with staff.

12. To sum up, I am of the opinion that the ESO has adequately explained how the Council had reached its decision of 23 September 1999 and has respected the principles set out under 7 of Judgment 1821. Accordingly, in my opinion, the application for execution should be dismissed on the merits.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Dierickx, Franza and Warmels (No. 4)**

Judgment No. 1996

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr Philippe Dierickx and Mr Francis Franza and the fourth complaint filed by Mr Rein Herm Warmels against the European Southern Observatory (ESO) on 2 December 1997 and corrected on 24 March 1999, the ESO's reply of 30 September, the complainants' rejoinder of 13 December 1999 and the Observatory's surrejoinder of 17 March 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The evolution of ESO policy on staff pay and facts relevant to this case are set out under A in Judgments 1419 (*in re* Meylan and others) and 1821 (*in re* Allaert and Warmels No. 3) delivered respectively on 1 February 1995 and 28 January 1999.

In November 1995 the ESO Council decided to amend Article R IV 1.01 of the Staff Regulations so that the index calculated by the Coordinating Committee on Remuneration of the Coordinated

Organizations* would henceforth serve only as an "orientation" in reviewing the salaries and allowances paid to the ESO staff and that "the economic budgetary and social situation prevailing both in the Organisation and in the member states" would be taken into account by the Council "[w]hen assessing whether or to which extent this index [shall] be applied".

For 1997 the Coordinating Committee recommended adjusting pay by 1.6 per cent in Germany. The ESO Administration proposed to the Working Group of the Finance Committee that an adjustment of 0.6 per cent should be applied as from 1 July 1997 – i.e. an adjustment of 0.3 per cent for the whole of 1997 – so as to take account of Gross Domestic Product growth in the majority of ESO member States and the Observatory's "particularly difficult" budgetary situation. On 15 April 1997 the Working Group stated its preference for an adjustment of zero. By a letter of 29 April four staff representatives wrote to the members of the Council and the Finance Committee objecting to the fact that some delegations wished to reduce the entitlements of the ESO staff. On 8 and 9 May, the Finance Committee recommended to the Council an "adjustment [of] 0.0%". At its meeting of 4 and 5 June 1997 the Council decided not to adjust salaries for 1997.

On 6 August the complainants wrote to the Director General challenging their pay slips for July 1997, received on 14 July, as being the first individual decisions applying the Council's general decision. They asked him to waive the internal appeal procedure. By a letter of 4 September 1997, which is the impugned decision, the head of Administration authorised them on the Director General's behalf to put their case directly to the Tribunal, thereby rejecting their appeals by implication.

B. The complainants observe that, in determining the adjustments for 1997, the Observatory took as a basis the salaries paid to staff in 1996 although in Judgment 1821 the Tribunal had deemed them unlawful. The ESO therefore committed an error of fact in that the unlawfulness of the

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* They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

1996 salaries "mechanically" affects the lawfulness of pay in 1997. Furthermore, the ESO disregarded the principles governing the limits on the discretion of international organisations to set adjustments in staff pay, which the Tribunal recalled in Judgment 1821. In particular, it has not changed the procedure criticised by the Tribunal and its reasons for refusing the adjustment are unknown, revealing "the mere desire to save money at the staff's expense". Lastly, in Judgment 1821 under 10, the Tribunal found the ESO to be in breach of Article R IV 1.01 of its own Staff Regulations; and that finding also applies to the impugned decision.

They seek the quashing of the decision and an award of costs.

C. In its reply the ESO observes that in Judgment 1821 the Tribunal recognised that an international organisation is free to choose a system for determining salary adjustments and use its discretion to depart from an external standard provided that it states proper reasons for such departure. In its submission what needs to be determined therefore is whether the ESO Council had proper reasons for deciding not to apply the Coordinated Organizations index for 1997. It produces documents reflecting the discussions the Finance Committee held on the implementation of the criteria set out in Article R IV 1.01.

It notes that the Council considered the following criteria in coming to its decision: the economic and budgetary situation prevailing in the ESO and its member States; the need to maintain competitive levels of salary; and the need to consider the social situation of staff and maintain the purchasing power of their salaries. First, the Council found that the Observatory's budgetary situation remains critical as the member States are faced with budgetary restraints, which is why it decided to align ESO salaries and allowances with those of other scientific international organisations. Secondly, the Council compared the evolution of ESO salaries with that of German high-tech industries and public research institutes "in order to motivate the staff and to assure the organisation's competitiveness with respect to comparable employment in industry". Thirdly, the Council wanted to reduce the gap between the evolution of inflation in the host country and the evolution of the ESO salaries. The Council's decision was therefore based on proper reasons and warranted.

D. In their rejoinder the complainants question the goodwill of the Observatory and accuse it of resorting to dilatory tactics. In their view, the documents produced cannot be regarded as evidence since they came from the Finance Committee and not the decision-making body, which is the Council. The positions – and even more so the reasons – that delegations put forward may vary depending on whether they are on the Finance Committee or the Council. Furthermore, the ESO said that the member States expressed their positions in restricted sessions and meetings for which there were no complete minutes or records. That prevented the Tribunal from fulfilling its role as a review body. They add that there are limits to the discretionary authority that the Tribunal allows the governing bodies of international organisations.

In subsidiary pleas the complainants contend that the arguments the ESO submitted in its reply as being the ones which led to the adoption of the decisions indirectly challenged afford no legal basis for those decisions. First, they contest the assertions concerning the ESO's financial situation. In their view, the argument that member States wished to align ESO salaries with those of other scientific international organisations is not "legally admissible" and besides, it was based on wrong figures. Secondly, they object that comparisons were made only with German employers whereas Article R IV 1.01 stipulates that the situation in the member States must be considered. Furthermore, the national civil servants to whom they are compared have job security, are not generally expatriates and do not have to work in one or more foreign languages and a multicultural environment. The ESO produced only abridged versions of the studies to which it refers; in particular, it omitted the passages indicating that expatriate compensation was lower at the ESO than in German industry and that the limited duration of contracts at the ESO was disadvantageous. The fact that staff have challenged all salary adjustments since 1996 shows that the objective of "motivating the staff" has not been attained. Thirdly, the Observatory's reply states clearly that the Council wished to index the adjustment of ESO staff pay to the evolution of inflation in Germany – yet the rules in force make no such provision.

They conclude that in taking the decision on pay adjustment for 1997 the ESO used no methodology which would "produce results that are stable, foreseeable and clearly understood" as the Tribunal requires.

E. In its surrejoinder the ESO gives an account of the constraints it has been under in resolving pay adjustment disputes since 1996. It considers that it has given a satisfactory explanation of its decisions, particularly in its reply to the present complaint which "truly expresses the position of the ESO Council". It submits that the application of the criteria set out in Article R IV 1.01 necessarily involves the recognition of the Council's discretionary authority.

In response to the complainants' pleas, it notes that scientific personnel employed by German public research institutions do not have security of employment as they are not civil servants and that the ESO compensates expatriate staff by entitling them to an expatriation allowance. Lastly, it denies that its arguments are based on wrong figures and that the only criterion it considers is the evolution of inflation in Germany, though, it adds, that criterion does afford protection against the erosion of the staff's purchasing power.

CONSIDERATIONS

1. The complainants are asking the Tribunal to quash the Director General's decision of 4 September 1997 which rejected their appeal challenging the adjustment of their pay as being in breach of the rules and their acquired rights, and to award them full redress.

2. The Tribunal has already addressed the issue of the annual adjustment of the ESO staff pay in connection with the adjustment procedures applied by the Coordinated Organizations. In Judgment 1821, among others, it ruled on the evolution of ESO policy on staff pay over recent years and recalled the principles governing the limits on the discretion of international organisations to set the pay of their staff.

3. In this case the complainants are objecting to a decision taken by the ESO Council not to adjust staff salaries for 1997 although the

Coordinated Organizations had recommended an adjustment rate of 1.6 per cent for Germany for that year.

4. The complainants allege that the Observatory made a mistake of fact by taking account of the salaries paid to staff in 1996 in determining pay for 1997 despite the fact that in Judgment 1821 the Tribunal ordered the ESO "to recalculate the adjustment of salary for staff as from 1 January 1996 in accordance with Article R IV 1.01 of the Staff Regulations and in the light of this judgment".

The plea fails. When the Council decided on 4 and 5 June 1997 not to adjust pay for 1997, the only factor it could take into account was the salaries actually paid to staff in 1996. Not until 28 January 1999, the date on which Judgment 1821 was delivered, was the Observatory ordered to recalculate the pay adjustment to be applied from 1 January 1996.

5. The complainants accuse the ESO of disregarding the principles governing the limits on the discretion of international organisations to set adjustments in staff pay and of offending against Article R IV 1.01 of the Staff Regulations. That article says:

> "When reviewing remuneration and allowances, the Council shall use as an orientation an index which shall correspond to the adjustment rate calculated according to the salary adjustment procedure of the Coordinated Organizations with respect to adjustments of the basic salary scales of the Coordinated Organizations in Germany.
>
> When assessing whether or to which extent this index shall be applied as the actual salary increase, Council shall take into account relevant criteria including the economic, budgetary and social situation prevailing both in the Organization and in the member states.
>
> The basic salary scales and the allowances for international staff in Germany and Chile shall be approved by the Council.
>
> *) The remuneration and allowances for members of the personnel at duty stations outside Germany shall be adjusted by applying a cost of living differential in order to obtain equal purchasing power using Munich as lead town.
>
> *) Applicable as of June 8, 1995"

6. In Judgment 1821 the Tribunal recalled that where a methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organisation has a duty to state proper reasons

for such departure (see Judgment 1682, *in re* Argos and others). It accordingly acknowledged that the ESO could depart from the external standard of reference but was bound to give reasons based on relevant criteria justifying its departure from the external standard.

7. Citing Judgment 1912 (*in re* Berthet No. 2 and others), the Observatory asserts that it had proper reasons in deciding not to apply the index resulting from the decisions of the Coordinated Organizations.

However, departure from the index given as an orientation in the Staff Regulations requires more than just a statement of proper reasons. In order to protect staff against arbitrariness, the criteria relied on to deviate from the orientation suggested by the external index must be objective, adequate and known to the staff (see Judgment 1912, under 15).

8. In Judgment 1912 the Tribunal found, on the strength of the evidence produced, that another organisation had demonstrated that "the automatic application of the index resulting from the relevant decisions of the Coordinated Organizations would have led to increased disparity of purchasing power between the staff according to the salary scales applicable to their duty station". But the Tribunal finds that, unlike the defendant in that case, the ESO has failed to provide it with reliable means of objectively reviewing the reasons adduced to justify the impugned decision.

The ESO cites, among other reasons, the need to borrow owing to financial difficulties – of which it provides no evidence – the reduction or deferral of adjustment rates in some countries, and allowance for inflation. But it provides no cogent evidence in support, particularly as some of the issues were discussed by the Council in restricted sessions, of which there were no full records. As the Tribunal notes in Judgment 1995 (*in re* Allaert No. 2 and Warmels No. 5) delivered this day, the Observatory fails to show that it used a methodology that took account of objective criteria that would produce results that were stable, foreseeable and clearly understood.

9. The conclusion is that the ESO complied neither with the principle cited under 6 above nor with the provisions of Article R IV 1.01 of its Staff Regulations as construed by the Tribunal in Judgment 1821.

10. The decision not to adjust the complainants' remuneration for 1997 must therefore be set aside and the cases sent back to the Observatory for recalculation of the adjustment of their remuneration for 1997.

11. The complainants are entitled to an award of costs, which the Tribunal sets at 15,000 French francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The cases are sent back to the Observatory for recalculation of the adjustment of the complainants' remuneration for 1997 in accordance with Article R IV 1.01 of the Staff Regulations and in the light of this judgment.
3. The ESO shall pay the complainants an overall amount of 15,000 French francs in costs.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Dierickx (No. 2) and Franza (No. 2)**

Judgment No. 1997

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaints filed by Mr Philippe Dierickx and Mr Francis Franza against the European Southern Observatory (ESO) on 18 December 1998 and corrected on 24 March 1999, the ESO's reply of 30 September, the complainants' rejoinder of 13 December 1999 and the Observatory's surrejoinder of 17 March 2000;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The evolution of the ESO policy on staff pay and facts relevant to this case are set out under A in Judgments 1419 (*in re* Meylan and others) and 1821 (*in re* Allaert and Warmels No. 3) delivered respectively on 1 February 1995 and 28 January 1999.

In November 1995 the ESO Council decided to amend Article R IV 1.01 of the Staff Regulations so that the index calculated by the Coordinating Committee on Remuneration of the Coordinated

Organizations* would henceforth serve only as an "orientation" in reviewing the salaries and allowances paid to the ESO staff and that "the economic, budgetary and social situation prevailing both in the Organisation and in the member states" would be taken into account by the Council "[w]hen assessing whether or to which extent this index [shall] be applied".

For 1998 the Coordinating Committee recommended adjusting pay by 2.4 per cent in Germany. Having considered that recommendation as well as the ESO's financial difficulties and the substantial loss of earnings to staff resulting from the 1996 and 1997 adjustment policy, on 21 April 1998, the Working Group of the Finance Committee proposed applying an adjustment of 1.7 per cent as from 1 January 1998. At its meeting of 18 and 19 May 1998 the Finance Committee did not vote on the matter. On 11 and 12 June the Council decided to adjust pay for 1998 by 1.2 per cent. The head of Administration so informed staff in an internal memorandum of 2 July 1998.

On 27 August 1998 the complainants wrote to the Director General challenging their pay slips for July 1998, received on 17 July, as being the first individual decisions applying the Council's general decision. They asked him to waive the internal appeal procedure. By a letter of 22 September 1998 – the impugned decision – the head of Administration authorised them on the Director General's behalf to put their case directly to the Tribunal, thereby rejecting their appeals by implication.

B. The complainants allege an error of fact: in determining the adjustments for 1998 the Observatory took as a basis the salaries paid in 1997, which were themselves unlawful having been based on the remuneration in 1996, which the Tribunal censured in Judgment 1821. This, they say, "mechanically" affects the lawfulness of the impugned decision. Moreover, the ESO disregarded the principles governing the limits on the discretion of international organisations to set adjustments in staff pay, which the Tribunal recalled in Judgment 1821. In particular, the ESO has neither changed the procedure censured by the Tribunal nor given the reasons for the adjustment. Lastly, in Judgment 1821 under 10, the Tribunal found the ESO to be in breach of Article R IV 1.01 of its own Staff Regulations; and that finding also applies to the impugned decision.

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*They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

They seek the quashing of the decision and an award of costs.

C. In its reply the ESO observes that in Judgment 1821 the Tribunal recognised that an international organisation is free to choose a system for determining salary adjustments and use its discretion to depart from an external standard provided that it states proper reasons for such departure. In its submission what needs to be determined therefore is whether the ESO Council had proper reasons for applying only in part the Coordinated Organizations index for 1998. It produces documents reflecting the discussions the Finance Committee held on the implementation of the criteria set out in Article R IV 1.01.

It notes that the Council considered the following criteria in coming to its decision: the economic and budgetary situation prevailing in the ESO and its member States; the need to maintain competitive levels of salary; and the need to consider the social situation of staff and maintain the purchasing power of their salaries. First, the Council found that the Observatory's budgetary situation remains critical as the member States are faced with budgetary restraints, which is why it decided to align ESO salaries and allowances with those of other scientific international organisations. Secondly, the Council compared the evolution of ESO salaries with that of German high-tech industries and public research institutes "in order to motivate the staff and to assure the organisation's competitiveness with respect to comparable employment in industry". Thirdly, the Council wanted to reduce the gap between the evolution of inflation in the host country and the evolution of the ESO salaries. The Council's decision was therefore based on proper reasons and warranted.

D. In their rejoinder the complainants question the goodwill of the Observatory and accuse it of resorting to dilatory tactics. In their view, the documents produced cannot be regarded as evidence since they came from the Finance Committee and not the decision-making body, which is the

Council. The positions – and even more so the reasons – that delegations put forward may vary depending on whether they are on the Finance Committee or the Council. The complainants observe that the document produced does not show that the Council took its decision on the 1998 adjustments on the basis of the arguments put forward in the reply. Furthermore, the ESO said that the member States expressed their positions in restricted sessions and meetings for which there were no complete minutes or records. That prevented the Tribunal from fulfilling its role as a review body. They add that there are limits to the discretionary authority that the Tribunal allows the governing bodies of international organisations.

In subsidiary pleas the complainants contend that the arguments the ESO submitted in its reply as being the ones which led to the adoption of the decisions indirectly challenged afford no legal basis for those decisions. First, they contest the assertions concerning the ESO's financial situation. In their view, the argument that member States wished to align the ESO salaries with those of other scientific international organisations is not "legally admissible" and besides, it was based on wrong figures. Secondly, they object that comparisons were made only with German employers whereas Article R IV 1.01 stipulates that the situation in the member States must be considered. Furthermore, the national civil servants to whom they are compared have job security, are not generally expatriates and do not have to work in one or more foreign languages and a multicultural environment. The ESO produced only abridged versions of the studies to which it refers; in particular, it omitted the passages indicating that expatriate compensation was lower at the ESO than in German industry and that the limited duration of contracts at the ESO was disadvantageous. The fact that staff have challenged all salary adjustments since 1996 shows that the objective of "motivating the staff" has not been attained. Thirdly, the Observatory's reply states clearly that the Council wished to index the adjustment of the ESO staff pay to the evolution of inflation in Germany, yet the rules in force make no such provision and in any event, the 1998 adjustment was lower than the inflation rate in Germany which was 1.7 per cent, the figure on which the Finance Committee based its recommendation.

They conclude that in taking the decision on pay adjustment for 1998 the ESO used no methodology which would "produce results that are stable, foreseeable and clearly understood" as the Tribunal requires.

E. In its surrejoinder the ESO gives an account of the constraints it has been under in resolving pay adjustment disputes since 1996. It considers that it has given a satisfactory explanation of its decisions, particularly in its reply to the present complaint which "truly expresses the position of the ESO Council". It submits that the application of the criteria set out in Article R IV 1.01 necessarily involves recognition of the Council's discretionary authority.

In response to the complainants' pleas, the Observatory notes that scientific personnel employed by German public research institutions do not have security of employment as they are not civil servants and that the ESO compensates expatriate staff by entitling them to an expatriation allowance. Lastly, it denies that its arguments are based on wrong figures and that the only criterion it considers is the evolution of inflation in Germany, though, it adds, that criterion does afford protection against the erosion of the staff's purchasing power.

CONSIDERATIONS

1. The facts of this case are much the same as those of the case on which the Tribunal has ruled in Judgment 1996 (*in re* Dierickx and others) delivered this day and to which it refers.

2. The complainants are challenging the individual application to them of a decision taken by the ESO Council to adjust staff pay for 1998 by only 1.2 per cent in spite of the fact that the Coordinating Committee on Remuneration in the Coordinated Organizations recommended an adjustment of 2.4 per cent and the German consumer price index had risen by 1.7 per cent.

3. These complaints raise much the same issues as the one ruled on in Judgment 1996 mentioned above, and the parties arguments are the same in both cases.

4. Accordingly, for the reasons it gave in the above mentioned judgment, the Tribunal concludes that the ESO's decision to adjust the pay of its staff by 1.2 per cent for 1998 must be set aside and the cases sent back to the Observatory for recalculation of the adjustment of their remuneration for 1998.

5. The complainants are entitled to an award of costs which the Tribunal sets at 15,000 French francs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The cases are sent back to the Observatory for recalculation of the adjustment of the complainants' remuneration for 1998 in accordance with Article R IV 1.01 of the Staff Regulations and in the light of this judgment.
3. The ESO shall pay the complainants an overall amount of 15,000 French francs in costs.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-NINTH SESSION

***In re* Palma (No. 2)**
(Application for review)

Judgment No. 1998

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Francesco Palma against the European Organization for Nuclear Research (CERN) on 20 September 1999 and which constitutes an application for review of Judgment 1665;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

The complainant seeks review of Judgment 1665, in which the Tribunal dismissed a complaint he had filed against a decision by the Governing Body of the CERN Pension Fund. The complaint is unsubstantiated and therefore clearly irreceivable. It must be dismissed according to the summary procedure provided for in Article 7 of the Rules of the Tribunal.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative

EIGHTY-NINTH SESSION

***In re* Sokolov (No. 2)**
(Application for review)

Judgment No. 1999

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr Dmitri Konstantinovich Sokolov on 1 March 2000 for review of Judgment 1940;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. By Judgment 1940 the Tribunal dismissed Mr Sokolov's complaint against the World Health Organization (WHO). Alleging unjust treatment by the WHO and citing the precedent set in Judgment 442 (*in re* deVillegas No. 4) the complainant is seeking review of Judgment 1940. He presses his earlier claims to the Tribunal to order the WHO to send certain documents to the United Nations Joint Staff Pension Fund and to pay him compensation for the injury of various kinds which he alleges to have suffered.

2. As the Tribunal said in Judgment 442, its judgments carry the authority of *res judicata* and will be reviewed only in exceptional cases. Allegations of a mistake of law, misappraisal of the facts or failure to admit evidence do not constitute admissible grounds for review.

3. In the present case none of the complainant's allegations constitutes admissible grounds for review. His pleas being clearly irreceivable, the Tribunal will dismiss his application in accordance with the summary procedure set in Article 7 of its Rules.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

EIGHTY-NINTH SESSION

***In re* Gupta (No. 7)**
(Application for review)

Judgment No. 2000

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint against the World Health Organization (WHO) filed by Mr Shiv Raj Gupta on 4 October 1999 and corrected on 18 October;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. This is an application for review of Judgment 1860, which the Tribunal delivered on 8 July 1999. That judgment upheld – within the limited scope of the Tribunal's power of review in matters concerning an appointment – the lawfulness of the selection process the WHO had used in filling the post of assistant I, at grade ND.5, in its Regional Office for South-East Asia (SEARO) for which the complainant, a staff member of SEARO, had applied but was not appointed.

2. The complainant alleges that the Tribunal erred in holding under 5(d) that the memorandum of the Regional Director, dated 17 June 1994, on staff selection and recruitment procedures, was of a general nature; and that the specific requirements in the vacancy notice for the post at issue

prevailed over the general provisions in the memorandum. Furthermore, on the matter regarding the computer skills test held during the selection procedure, he alleges that, contrary to what the Tribunal had implied, the job titles listed in the memorandum did not simply provide examples but constituted an exhaustive list of the specific posts for which the Organization may hold tests during the selection process – and then too only at entry level. Therefore, since the post in question had not been so specified in the memorandum, a test could not be held for it.

3. He claims that the WHO is bound by the procedure established in that memorandum and therefore the Regional Director could not prescribe that a test be taken by serving staff members.

4. According to its case law, the Tribunal will not allow review of a judgment on the grounds of an alleged mistake of law (see Judgment 442 *in re* de Villegas No. 4). The Tribunal, in interpreting the meaning of the memorandum and its legal position vis-à-vis the Organization's decision to hold a test as set out in the vacancy notice and the legality of the test, was pronouncing on a matter of law. Therefore, its judgment is not subject to review in this respect.

5. The complainant also alleges that the Tribunal erred in holding under 5(e) that the WHO could change the composition of the Selection Committee during the selection process. What the Tribunal said in its judgment was that the complainant's plea that the Administration had breached a rule of general law must fail since it was due to the absence of a titular member that it was found necessary to replace her with an alternate member. Here too the Tribunal was ruling on a question of law and its judgment is not subject to review.

6. The complainant also refers to the argument that he had raised in his rejoinder that the decision of the regional Board of Appeal was flawed because the chairmanship had been changed at the reporting stage. In its surrejoinder the Organization replied that even though the complainant had

been informed that the Chairman of the regional Board of Appeal had been appointed only for one year, he did not challenge the composition of the Board at the time.

7. The Tribunal did not rule on that plea. However, failure to rule on a plea – as distinct from failure to rule on a claim – is not an admissible ground for review (Judgment 442).

8. Lastly, the complainant submits that he has now come to know that two changes were made in the membership of the Ad Hoc Selection Committee and not just one. He does not say when or how this came to his knowledge, nor does he indicate whether it was a fact which, with due diligence, he could have discovered in time for its inclusion in the original proceedings. Likewise, he fails to mention how this fact could have materially affected the decision of the Tribunal.

9. There were in effect two meetings of the Ad Hoc Selection Committee. At the first one, held on 13 September 1996, the Committee decided to hold a test for eligible candidates to evaluate their computer skills. At the second meeting, held on 24 October 1996, the Committee selected a candidate on the basis of the test.

10. The second change in the composition of the Committee, now alleged by the complainant, is that the staff representative who had been present at the first Committee meeting was replaced by another staff representative at the second meeting.

11. WHO Manual paragraph II 3.390 requires that an ad hoc selection committee has to consist of a personnel officer, an official from the unit with the vacancy, an official from outside the concerned unit and a staff representative likewise from another unit. There exists no general rule of law that would prevent an ad hoc selection committee, which effectively had made no selection, from being set up anew to deal with the actual selection itself. Therefore, even if the second change in composition was regarded as

a "new" fact which could not reasonably have been discovered in time for inclusion in the original proceedings – which the complainant has not in fact proved – it is of no avail to the complainant. There was no breach of any general rule and there was no failure to observe the Staff Rules and Regulations in the implementation of the selection procedure.

12. The application is clearly devoid of merit and it must be summarily dismissed in accordance with Article 7(2) of the Tribunal's Rules.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

CATHERINE COMTET

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

In re **Palma (Nos. 12, 13 and 16)** **Judgment No. 2001**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth, thirteenth and sixteenth complaints filed by Mr Francesco Palma against the European Southern Observatory (ESO) on 22 August, 27 August, and 12 October 1998, respectively;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. The complainant is a former staff member of the ESO whose situation has been addressed in several earlier judgments. He has now filed three new complaints challenging, respectively:

- the implied decision of the Director General of the Observatory to reject a request submitted on 6 April 1998 by the complainant for "review" of a decision of 26 January 1995 refusing to renew his contract;
- the implied rejection of a request of 7 April 1998 for review of a decision of 13 June 1995 whereby the Director General rejected an appeal filed on 31 May 1995 and declared the matter closed;
- the implied rejection of a request of 26 May 1998 recalling a previous claim to redress for injury – estimated at 15 million

United States dollars – allegedly sustained in 1995 and asking the Tribunal to send the matter back to the ESO Council.

2. The Tribunal will join the three complaints. The first two are clearly irreceivable because his requests of 6 and 7 April 1998 to the Observatory challenged the lawfulness of the individual decisions of 26 January and 13 June 1995 to reject his claims and were therefore not filed within the time limit for appeal. The implied decisions he is challenging therefore merely confirm the earlier rejections. The third complaint is also irreceivable because it claims redress for injury allegedly sustained in 1995 and because the complainant fails to show either its existence or its nature.

So the Tribunal cannot but dismiss the complaints in accordance with the summary procedure provided for by Article 7 of its Rules.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Palma (Nos. 18, 19, 20, 21 and 22)**
(Applications for review)

Judgment No. 2002

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighteenth complaint filed by Mr Francesco Palma on 5 February 1999, the nineteenth complaint filed on 22 July, and the twentieth, twenty-first, and twenty-second complaints filed on 20 September 1999, all against the European Southern Observatory (ESO) and which constitute applications for review of Judgments 1785, 1843, 1718, 1844, and 1845, respectively;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

The complainant is a former staff member of the ESO whose appointment was not renewed following its expiry on 31 August 1995. Having filed numerous complaints with the Tribunal he has now applied for review of Judgments 1718, 1785, 1843, 1844 and 1845. The Tribunal joins the five applications and will dismiss them summarily under Article 7 of its Rules. His applications for review of Judgments 1718, 1844 and 1845 are unsubstantiated and therefore clearly irreceivable. His applications for review of Judgments 1785 and 1843 contain pleas that would have been admissible had they been founded, such as failure to take account of certain facts, alleged error of facts, omission to rule on a claim or the discovery of new facts. However, they cannot succeed because what the complainant is really challenging is the Tribunal's legal reasoning and appraisal of the facts. The conclusion is that none of the grounds for review exist here.

DECISION

For the above reasons,

The applications are dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT MELLA CARROLL JAMES K. HUGESSEN

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-NINTH SESSION

***In re* Etien-Lichtherte**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Anne-Marie Etien-Lichtherte against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 12 November1999 and corrected on 25 November 1999, and Eurocontrol's reply of 25 February 2000;

Considering that by a letter of 29 March 2000 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;

Considering that by a letter of 14 April 2000 the Organisation informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-NINTH SESSION

***In re* Goode (No. 2)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Jeffrey Harold Goode against the International Labour Organization (ILO) on 4 March 1999 and corrected on 16 March, the ILO's reply of 2 June and the complainant's rejoinder of 11 August 1999;

Considering that by a letter of 13 December 1999 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit;

Considering that by a letter of 14 January 2000 the Organization informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

In re **Kirsch (No. 2)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr William Joseph Kirsch against the International Telecommunication Union (ITU) on 11 October 1999 and corrected on 4 November;

Considering that by a faxed letter of 10 November 1999 the complainant informed the Registrar of the Tribunal that he wished to withdraw suit, and that the Union has not answered the Registrar's letter of even date inviting it to comment on the withdrawal;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-NINTH SESSION

***In re* Müller-Engelmann (No. 8)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 1 July 1999 and corrected on 7 September, and the EPO's reply of 3 December 1999;

Considering that by a letter of 20 February 2000 the complainant informed the Registrar of the Tribunal that she wished to withdraw suit;

Considering that by a letter of 6 March 2000 the Organisation informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET

EIGHTY-NINTH SESSION

***In re* Techasarin**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Chirawan Techasarin against the International Labour Organization (ILO) on 17 May1999 and the ILO's reply of 1 September 1999;

Considering that by a letter of 1 November 1999 the complainant informed the Registrar of the Tribunal that she wished to withdraw suit;

Considering that by a letter of 16 November 1999 the Organization informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

MICHEL GENTOT

Mella Carroll

MELLA CARROLL

JAMES K. HUGESSEN

CATHERINE COMTET

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
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Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-NINTH SESSION

***In re* Tsolos (No. 2)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Georges Tsolos against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 12 November 1999 and corrected on 25 November 1999, and Eurocontrol's reply of 25 February 2000;

Considering that by a letter of 29 March 2000 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;

Considering that by a letter of 14 April 2000 the Organisation informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

CATHERINE COMTET